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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PETER ALAN KASLER, ET AL.

Petitioners,

v.

BILL LOCKYER, CALIFORNIA ATTORNEY GENERAL, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the add-on provision of California's Assault Weapons Control Act violates Due Process by:

   a. Providing to firearms owners and dealers only publication notice of the initiation of an add-on proceeding when actual notice is possible;

   b. Subjecting firearms owners to criminal prosecution for possession, sale, or transfer of certain firearms that were added to a list of banned firearms in a judicial proceeding in which they are not permitted to participate except as amici curiae;

   c. Conclusively determining in a civil proceeding from which owners and dealers are denied any right to intervene a key element of any future criminal prosecution, thereby depriving prosecuted owners and dealers of the rights to trial by jury, present evidence, cross-examine witnesses, and be judged under the reasonable doubt standard rather than a preponderance of the evidence standard; and

   d. Giving unbridled discretion to the Attorney General to add firearms to the prohibited list based on an unconstitutionally vague definition?

2. Whether the add-on provision of the Act violates the Equal Protection clause by affording to firearms manufacturers and California distributors, but not to owners and dealers, a right to participate in the quasi-legislative judicial proceeding by which additional firearms are added to the statutory list of prohibited firearms?

3. Whether California's decision to ban the firearms of some while not banning identical or virtually identical firearms of others is irrational and therefore a violation of the Equal Protection Clause?

PARTIES TO THE PROCEEDING

Petitioners are Prof. Howard McCord; Prof. Gary Mauser; Prof. Joseph P. Magaddino; Peter Alan Kasler; Prof. John W. Bowman; Prof. David Henderson; Sean Ford; Edgar A. Suter, M.D.; Prof. Edward Erler; James M. Mixson; Prof. Ronald Howard; Prof. Paul Krot; and Colt's Manufacturing Co., a Delaware Corporation. The parent company of Colt's Manufacturing Co. is Colt Holding Corp., a Delaware Corporation. Colt's Manufacturing Co. has no subsidiaries.

Respondents are Bill Lockyer, in his official capacity as Attorney General of the State of California; the California Department of Justice; and the State of California.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL & STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. The California Supreme Court's Approval Of The "Add-On" Provision, Which Permits The Banning Of Property In A Judicial Proceeding Without Notice To The Affected Property Owners, Violates The Right To Due Process Protected By The 14th Amendment And Conflicts With A Decision By Another State's Highest Court. 6

A. The California Supreme Court's Decision Is In Conflict With This Court's Due Process Precedents Regarding Notice And An Opportunity To Be Heard. 7

B. The Decision Below Conflicts With A Decision By The Supreme Court of Washington. 10

C. The Decision Below Also Conflicts With Decisions By The Supreme Court of Colorado and the Sixth Circuit Court of Appeals. 10

II. By Denying Owners And Dealers Of The Same Right To Intervene In The Judicial Add-On Proceeding That It Affords To Manufacturers And California Distributors, The Act Deprives Owners And Dealers Of The Equal Protection Of The Laws. 12

III. The Act Arbitrarily and Irrationally Restricts The Firearms of Some While Leaving Identical or Virtually Identical Firearms of Others Unregulated, Contrary to the Equal Protection Rulings of this Court and in Conflict with the Sixth Circuit 13

A. The Decision Below Conflicts with this Court's Equal Protection Precedents. 13

B. The Decision of the California Supreme Court Broadens an Existing Conflict Among State Courts and at least one Federal Court of Appeals. 15

CONCLUSION 22

APPENDIX

Supreme Court of California Opinion 1a

Assault Weapons Control Act of 1989 ..... 53a

California Supreme Court Order Denying Petition for Rehearing 68a

California Court of Appeal Opinion 69a

California Superior Court Dismissal Order 103a

First Amended Complaint (excerpts) 104a

Petitioners' Opening Brief in California Court of Appeals (excerpts) 108a

Petitioners' Answer Brief California Supreme Court (excerpts) 114a

Petitioners' Petition for Limited Rehearing in California Supreme Court (excerpts) 117a

TABLE OF AUTHORITIES

CASES

Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) 18

Bolling v. *Sharpe*, 347 U.S. 497 (1954).....17

Chambers v. *Mississippi*, 410 U.S. 284 (1973).....12

Citizens for a Safer Community v. *City of Rochester*, 627 N.Y.S.2d 193 (N.Y. Sup. Ct. 1994).....16

Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985) 21

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).....8

FCC v. *Beach Communications, Inc.*, 508 U.S. 307 (1993).....17

Grayned v. *City of Rockford*, 408 U.S. 104 (1972).....9

Hays v. *Wood*, 603 P.2d 19 (Cal. 1979).....21

In re Jorge M., 4 P.3d 297 (Cal. 2000) 14

Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972) ..18

McKinney v. *Alabama*, 424 U.S. 669 (1976).....10

Memphis Light, Gas & Water Division v. *Craft*, 436 U.S. 1 (1978).....8

Mennonite Board of Missions v. *Adams*, 462 U.S. 791 (1983).....7

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).....18

New Orleans v. *Dukes*, 427 U.S. 297 (1976).....17

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928).....12

Olympic Arms v. *Magaw*, 91 F. Supp. 2d 1061 (E.D. Mich. 2000) 17

Parklane Hosiery Co., Inc. v. *Shore*, 439 U.S. 322 (1979) ... 8

Peoples Rights Organization, Inc. v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ..... passim

Railway Express v. *New York*, 336 U.S. 106 (1949) 21

Reed v. *Reed*, 404 U.S. 71 (1971) 15

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 5

Robertson v. *City and County of Denver*, 874 P.2d 325 (Colo. 1994) 5, 8, 10, 11

Robinson v. *Hanrahan*, 409 U.S. 38 (1973) 7

Romer v. *Evans*, 517 U.S. 620 (1996) 15, 17

Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920) 15

San Antonio Ind. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 12

Soundgarden v. *Eikenberry*, 871 P.2d 1050 (Wash. 1994) .. 10

Springfield Armory, Inc. v. *City of Columbus*, 29 F.3d 250 (6th Cir. 1994) ..... passim

Street v. *New York*, 394 U.S. 576 (1969) 12

United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 20

Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 5

STATUTES

18 U.S.C. § 921 *et seq* 17

Cal. Penal Code § 12076 7

Cal. Penal Code § 12275 *et seq* ..... passim

Cal. Penal Code § 12276 ..... passim
Cal. Penal Code § 12276.5 ..... passim
Cal. Penal Code § 12280 ..... 3, 6
Columbus City Codes § 2323.01(1) 11
Denver Revised Municipal Code § 38-130(b)(1)(c) 11
U.S. Const. amend. XIV, § 1. ..... passim

OTHER AUTHORITIES

California Attorney General's Assault Weapons Identification Guide (1993) 14
G. Kleck, Point Blank: Guns and Violence in America (N.Y., Aldine, 1991) 20
Kessler, 82 J. Crim. L. & Crimin. 1187 (1992); 20
Mauser, 3 Crim. L. Forum 147 (1992) 20
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Walter, Rifles of the World (2d ed. 1998) 14

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Petition for Writ of Certiorari

Petitioners Peter Alan Kasler, et al., California taxpayers and citizens, respectfully request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered in the above-captioned case on June 29, 2000, rehearing denied on August 16, 2000.

OPINIONS BELOW

The opinion of the Supreme Court of California, dated June 29, 2000, is reported at 1 P.3d 581 and is reproduced at pages 1a-67a of the appendix to this petition ("Pet. App."). That Court's order denying Petitioners' motion for rehearing, dated August 16, 2000, is reproduced at Pet. App. 68a. The opinion of the California Court of Appeal, Third District, dated March 4, 1998, was vacated upon the grant of review by the Supreme Court of California, but it was previously published at 72 Cal. Rptr. 2d 260 and is reproduced at Pet. App. 69a-102a. The unpublished order of the trial court dismissing the complaint is reproduced at Pet. App. 103a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of California upholding the constitutionality of the Roberti-Roos Assault Weapons Control Act of 1989, Cal. Penal Code § 12275 *et seq.*, was entered on June 29, 2000. The court denied a petition for rehearing on August 16, 2000. A timely request for extension, filed on November 3, 2000, was granted by Justice O'Connor on November 6, 2000, extending the time in which to file this petition until December 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The California statute being challenged in this case, the Roberti-Roos Assault Weapons Control Act of 1989, Cal. Penal Code § 12275 *et seq.*, as amended, was published as an Appendix to the California Supreme Court's opinion and is reproduced at Pet. App. 53a-67a.

STATEMENT OF THE CASE

Petitioners brought suit in the Sacramento, California Superior Court challenging the constitutionality of various provisions of the Roberti-Roos Assault Weapons Control Act of 1989 (the "Act"), Cal. Pen. Code § 12275 *et seq.*. The Act makes it a felony, punishable by a minimum of four years in prison, to manufacture, distribute, transport, import, keep for sale, give or lend a specifically listed firearm or "minor

variations" of listed firearms. *Id.*, § 12280; *see also* § 12276 (the "list" provision). The Act also prohibits firearms that are added to the statutory list by a judicial add-on proceeding commenced by the California Attorney General. *Id.*, § 12276.5 (the "add-on" provision).

Petitioners challenged the Act on several state and federal constitutional grounds, specifically contending, *inter alia*, that:

1) The Act's add-on mechanism violated the Due Process Clause of the Fourteenth Amendment by failing to give actual notice to known gun owners and dealers, by depriving gun owners and dealers of the right to participate in the judicial proceeding in which their individual property rights would be affected, by making the ruling in the potentially non-adversarial civil proceeding conclusive in subsequent criminal proceedings against gun owners and dealers who were not permitted to participate in the civil add-on proceeding, by making criminal the sale or transport of firearms prohibited as a result of the civil add-on proceeding even before notice of the proceeding's results were promulgated in the California Code of Regulations, and by giving to the Attorney General unbridled discretion to add firearms to the prohibited list based on an unconstitutionally vague definition, Amended Complaint ¶¶ 53-68, 78-82, 88-97, 107-118;

2) The Act's add-on proceeding violated the Equal Protection Clause of the Fourteenth Amendment by affording to manufacturers and distributors, but not to individual gun owners and dealers, a right to intervene in the proceeding, Amended Complaint ¶¶ 98-103;

3) The statutory list of prohibited firearms irrationally lists the firearms of some individuals while excluding identical or virtually identical firearms of other individuals, in violation of the Equal Protection Clause of the Fourteenth Amendment, Amended Complaint ¶¶ 50-52.

The Superior Court sustained a demurrer without leave to amend except as to one cause of action not at issue here, and dismissed the entire action when Petitioners declined to amend, Pet. App. 103a. The California Court of Appeal, Third District, reversed, holding that the Act's "add-on" procedure effectively required judges to legislate in violation of separation of powers provision of the California constitution and that the Act violated the Due Process clause of the Fourteenth Amendment to the United States Constitution because it was unduly vague and because the add-on provision failed to give citizens advance notice of the conduct prohibited by it. Pet. App. 83a-85a. The Court of Appeal also held that the list provision was irrationally underinclusive in violation of the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 89a.

The Supreme Court of California reversed. Explicitly declining to follow the Sixth Circuit's reasoning in *Springfield Armory, Inc.* v. *City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994), it rejected petitioners' claim that the selective inclusion of some firearms and exclusion of other identical or virtually identical firearms deprived the owners of banned firearms of the equal protection of the laws. The court held that the Act's selective prohibition of some firearms but not other identical or virtually identical firearms was not irrational "because a perfectly comprehensive regulatory scheme was not politically achievable." Pet. App., 14a.

In her separate concurring opinion, Justice Brown (who also authored the primary opinion) acknowledged that the legislature's findings and its list declaration "seem internally inconsistent," and that "[c]onspicuous by its absence is any

finding that the listed weapons differ from those not listed with respect to the salient characteristic, namely, their 'rate of fire and capacity for firepower,'" but she nevertheless thought the partial list valid because "the Legislature sought to satisfy its need to do something about gun violence without awakening the political enmity of a large and effective constituency." Pet. App. 40a, 42a (Brown, J., concurring).

Justice Kennard argued in dissent that the majority had misapplied the rule, articulated by this Court in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), permitting legislatures to address problems one step at a time. Justice Kennard believed that the majority failed to recognize that "the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made." Pet. App. 51a (Kennard, J., dissenting) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-09 (1966) (internal quotation marks omitted)).

The court did not address petitioners' other Equal Protection claim, namely, that affording to manufacturers and distributors a right to intervene in the add-on proceedings that was denied to gun owners and dealers denied the latter the equal protection of the laws. Yet that claim was specifically raised in the complaint (Amended Complaint ¶¶ 98-103, *reprinted in* Pet. App. 104a-107a), before the intermediate court of appeals (Appellants' Opening Br., at ii-iii, 93-98, *reprinted in* Pet. App.108a-113a), and before the California Supreme Court (Appellants' Answer Br. at 1, 41-42, *reprinted in* Pet. App. 114a-116a; Petn. for Limited Rehearing, at 3-7, *reprinted in* Pet. App. 117a-121a).

The court also rejected petitioners' several Due Process claims. Explicitly (though erroneously) distinguishing *Springfield Armory* and the Supreme Court of Colorado's decision in *Robertson* v. *City and County of Denver*, 874 P.2d 325 (Colo. 1994), the court held that references in the Act's add-on provision to firearms that are but "slight modifications" or "redesign[ed]" versions of listed firearms was not unconstitutionally vague because those were issues to be addressed by

the Attorney General in deciding whether to commence an add-on proceeding, not issues that ordinary citizens would have to address once the add-on proceeding was concluded and specific named firearms were added to the statutory list. Pet. App. 29a.

Finally, although the Court acknowledged that petitioners' notice and opportunity to be heard claims "would raise grave due process concerns" if a prosecution was commenced based on the results of the civil add-on proceedings, it rejected petitioners' challenge, holding that the statute was not "facially unconstitutional." Pet. App. 32a.

REASONS FOR GRANTING THE WRIT

I. The California Supreme Court's Approval Of The "Add-On" Provision, Which Permits The Banning Of Property In A Judicial Proceeding Without Notice To The Affected Property Owners, Violates The Right To Due Process Protected By The 14th Amendment And Conflicts With A Decision By Another State's Highest Court.

The Act allows the Attorney General of California to petition a superior court for a declaration that a particular firearm should be added to the list of prohibited firearms because it is either a "copy" or "slight modification" of a listed firearm or because it is a "redesigned, renamed, or renumbered" version of a listed firearm. § 12276.5(a)(1-2). Upon filing the petition, the superior court must issue an order of temporary suspension, pursuant to which the "manufacture, sale, distribution, transportation, or importation" of the designated firearm becomes illegal while the petition is pending before the superior court. §§ 12276.5(a) & (b); 12280. The superior court then decides—after a hearing in which owners and dealers of the firearm have no right to participate, *see* § 12276.5(e)—whether the proposed firearm meets the statutory criteria. If the court finds that it does, it issues a declaration to that effect and the Attorney General

eventually adds the firearm to the list of prohibited firearms published periodically in the California Administrative Code. § 12276.5(h).

A. The California Supreme Court's Decision Is In Conflict With This Court's Due Process Precedents Regarding Notice And An Opportunity To Be Heard.

California's add-on procedure violates the Due Process Clause of the Fourteenth Amendment in several ways. First, only constructive notice (publication in ten newspapers around the state and in industry publications) of the add-on proceeding is provided to dealers and owners when actual notice to dealers and registered owners is possible.[1] A law providing for "notice by publication is not sufficient with respect to an individual whose name and address are known or reasonably ascertainable." *Robinson* v. *Hanrahan*, 409 U.S. 38, 40 (1973); *see also Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 795-800 (1983) ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed").[2]

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[1] Actual notice is only provided to "any known manufacturer and California distributor of the weapon which is the subject of the temporary suspension order" and to those individuals who have requested to receive notice of any declaration of temporary suspension. § 12276.5(d). Yet the Department of Justice has within its own files the names and addresses of all licensed California firearms dealers and all registered handgun owners. *See* Amended Complaint ¶ 95; *see also* Cal. Penal Code § 12076 (requiring that every retail purchaser of a handgun register name and address with the Department of Justice).

[2] The fact that firearms owners are permitted, pursuant to § 12276.5(d), to file a request for personal notice of the pendency of a § 12276.5 proceeding does not alter this conclusion. Fewer than .4% of the estimated ten million California gun owners have filed such requests, and

Second, the Act limits notice and the right to intervene to any known "manufacturer and California distributor of the weapon which is the subject of the temporary suspension order." § 12276.5(e). Owners and dealers are therefore not permitted to intervene in the superior court proceeding in which their individual property interests will be determined, although they may participate as amicus curiae at the discretion of the superior court. *Id.* This is especially troubling if a firearm against which an add-on proceeding is brought is a low production or out-of-production firearm; in such cases, it is very likely that no one will intervene to oppose the Attorney General's petition. As this Court has previously held, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979); *see also Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 16, n.17 (1978) (due process hearing includes right to support one's claim by proof); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915) ("It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard").

Third, the superior court proceeding conclusively determines whether a particular firearm meets the requirements of § 12276.5 in all future criminal prosecutions, taking that element of the crime of possession or transfer of such a firearm away from the jury, and indeed away even from the criminal court wherein individual defendants would be prosecuted. With respect to whether their firearm meets the

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the vagueness of the statutory provisions ("redesigned") makes many owners unaware that their firearms are even potentially the subject of a § 12276.5 proceeding. *See Springfield Armory*, 29 F.3d, at 252; *Peoples Rights Organization, Inc.* v. *City of Columbus*, 152 F.3d 522, 537 (6th Cir. 1998); *Robertson* v. *City and County of Denver*, 874 P.2d 325, 334-35 (Colo. 1994); *see also infra*, at 10-12.

statutory criteria, individual defendants are therefore denied the fundamental Due Process rights to confront witnesses, to present evidence, to have a jury trial, and to be judged under a reasonable doubt standard rather than the preponderance of the evidence standard that governs the § 12276.5 proceeding, *see* § 12276.5(f). Such a proceeding violates this Court's well-established Due Process clause precedent. *See Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (jury trial); *Montana* v. *Egelhoff*, 518 U.S. 37, 64 (1996) (right to present evidence); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (confront witnesses); *Jackson* v. *Virginia*, 443 U.S. 307 (1979) (proof beyond a reasonable doubt).

Finally, by allowing the Attorney General to broaden the Act's coverage to include firearms that he deems to be "slight modifications" or "redesigned" versions of listed firearms, § 12276.5(a)(1-2), the statute is unduly vague, giving to the Attorney General (and to the Superior Court) the unbounded discretion to enact rather than simply interpret the law and failing to give adequate notice to individual firearms owners even to be on the lookout for an add-on proceeding affecting their interests.[3] This Court has repeatedly made clear that laws which forbid or require the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application violate Due Process. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

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[3] While the California Supreme Court rejected petitioners' vagueness challenge on the ground that any vagueness evaporates once the firearm is listed under the add-on procedure, the statutory vagueness does affect whether individual owners and dealers will even be on the lookout for "add-on" proceedings that might render routine transportation or sale of their firearms criminal prior to publication of the add-on list. Moreover, the statutory list itself contains a similar vagueness defect. *See* § 12276(e) ("The term 'series' includes all other models that are only *variations, with minor differences*, of those models listed in subdivision (a), regardless of the manufacturer" (emphasis added)).

B. The Decision Below Conflicts With A Decision By The Supreme Court of Washington.

The California Supreme Court's holding that the Act's add-on mechanism does not facially violate Due Process is in conflict with *Soundgarden* v. *Eikenberry*, 871 P.2d 1050 (Wash. 1994), in which the Washington Supreme Court held that a similar statutory scheme did violate Due Process.[4]

The statute in *Soundgarden* provided for a civil proceeding, much like that commenced under the California Act by the Attorney General's petition, in which a music video could be declared "erotic." Notice of the suit need only be provided to one vendor of the video, yet criminal penalties attached to *any* vendor of the video once the declaration issued. *Id.*, at 1056. The court held that the declaratory mechanism, followed by subsequent criminal prosecution of persons not party to the initial civil proceeding, did "not measure up to the due process requirement of *McKinney* [v. *Alabama*, 424 U.S. 669 (1976)]." *Id.*, at 1063. Specifically, the court found that the Washington mechanism violated the due process requirements of notice and an opportunity to be heard, and also the constitutional right to a trial by jury. *Id.*

C. The Decision Below Also Conflicts With Decisions By The Supreme Court of Colorado and the Sixth Circuit Court of Appeals.

In addition, the California Supreme Court's holding that the add-on provision is not unconstitutionally vague conflicts with recent decisions of the Sixth Circuit and the Colorado Supreme Court. In *Robertson* v. *City and County of Denver*, 874 P.2d 325 (Colo. 1994), the Colorado Supreme Court invalidated a Denver ordinance which prohibited "[a]ll semiautomatic pistols that are *modifications* of [listed] rifles having the same make, caliber and action design but a shorter

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[4] *Soundgarden* also involved a First Amendment challenge, but only the Due Process argument, which was separately articulated by the court, is relevant here.

barrel and no rear stock or *modifications* of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds." *Id.*, at 334 (quoting Denver Revised Municipal Code § 38-130(b)(1)(c) (emphasis added)). The ordinance was unconstitutionally vague, according to the court, because it did not "provide sufficient information to enable a person of common intelligence to determine whether a pistol they possess or may purchase has a design history of the sort which would bring it within this section's coverage." *Id.*, at 335. "[A]scertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence." *Id.*

Similarly, the Sixth Circuit struck down a Columbus, Ohio ordinance banning specified firearms and "other models by the same manufacturer with the same action design that have *slight modifications or enhancements*." *Springfield Armory*, 29 F.3d, at 252 (quoting Columbus City Codes § 2323.01(1) (emphasis added)). The ordinance was "unconstitutionally vague on its face," according to the court, because "ordinary consumers cannot be expected to know the development history of a particular weapon" and therefore whether their weapon was merely a "modification" of one of the listed weapons. *Id.*, at 250, 253; *accord*, *Peoples Rights Organization*, 152 F.3d, at 537.

Because the California Act requires that individual consumers possess the same knowledge of a firearm's development history in order to know whether it is only a "slight modification" or "redesigned" version of a listed firearm that might be subject to an add-on proceeding as Columbus and Denver consumers were required to possess in order to know whether a firearm was merely a "modification," the California Act would not survive under the Colorado Supreme Court's ruling in *Robertson* or the Sixth Circuit's rulings in *Springfield Armory* and *Peoples Rights*

Organization. The split in decision about this fundamental aspect of Due Process warrants this Court's review.

II. By Denying Owners And Dealers Of The Same Right To Intervene In The Judicial Add-On Proceeding That It Affords To Manufacturers And California Distributors, The Act Deprives Owners And Dealers Of The Equal Protection Of The Laws.

As noted above, the add-on provision of the Act provides "manufacturers and California distributors" with a right to intervene in the judicial add-on proceeding, but provides no such right to owners or dealers, despite the fact that the latter groups' interests in the firearms that are the subject of the proceeding is at least as great as the former groups' interests. § 12276.5(d). Because the right not to be deprived of property without due process of law is a fundamental constitutional right, *cf. San Antonio Ind. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (describing as fundamental those rights that are "explicitly or implicitly guaranteed by the Constitution"), the legislative classification must be subjected to strict scrutiny, and can only be sustained if it is narrowly tailored to serve a compelling governmental interest.

Rather than finding that the Act was narrowly tailored to further a compelling governmental interest, the California Supreme Court did not address this equal projection claim at all, even after the omission was brought again to the court's attention in a petition for rehearing. The state courts cannot avoid review by this Court of federal constitutional issues merely by failing to address federal constitutional issues that have been properly raised. *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street* v. *New York*, 394 U.S. 576, 584 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

III. The Act Arbitrarily and Irrationally Restricts The Firearms of Some While Leaving Identical or Virtually Identical Firearms of Others Unregulated, Contrary to the Equal Protection Rulings of this Court and in Conflict with the Sixth Circuit.

A. The Decision Below Conflicts with this Court's Equal Protection Precedents.

The California Act prohibits certain specified firearms but not identical or virtually identical, functionally equivalent firearms produced by other manufacturers.[5] As the Sixth Circuit recognized in striking down the similar Columbus, Ohio, ordinance (which was modeled on the California Act), "The Colt AR-15 Sporter is banned but not identical weapons sold by" seven other manufacturers. *Springfield Armory*, 29 F.3d, at 252. The California Department of Justice has gone even further, identifying twelve additional firearms identical to the Colt AR-15 that are not banned by the California Act.[6] Numerous other examples of this "under-inclusion" of identical or nearly identical firearms problem exist in the Act's statutory list.[7]

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[5] What is meant by "identical" is that the firearms are clones of each other. For example, if the banned Colt and the eighteen unregulated clones are disassembled into a common container, nineteen "new" rifles could be reassembled from the jumble of interchangeable parts. The only part that is distinguishable is the receiver, and that only because it bears the manufacturer's name. Virtually identical firearms, though not identical clones, are indistinguishable from each other in action type, cartridge size, and weight, as well as in the rate of fire and capacity for firepower, the only characteristics recognized by the codified legislative findings. *See infra*, at 15 n.8.

[6] A Department of Justice memorandum introduced in the trial court identified 15 "manufacturers/importers or suppliers of the AR-15 type rifle." Three of these were also identified by the Sixth Circuit in *Springfield Armory*, as were four others, which the California Department of Justice did not identify.

[7] Amended Complaint ¶¶ 17-23. The fact that the Attorney General might

The California Supreme Court itself has subsequently acknowledged that listed weapons are not "universally distinguishable by their appearance from firearms not listed in section 12276." *In re Jorge M.*, 4 P.3d 297, 307 (Cal. 2000). "While many of the rifles depicted in the [California Attorney General's Assault Weapons] Identification Guide are of particularly menacing appearance," noted the court, others "are not obviously unsuited, to the untrained eye at least, for hunting, ranching and farming uses, or target shooting. *Id.*, at 308 (citing California Attorney General's Assault Weapons Identification Guide pp. 6, 7, 18, 23, 26, 28 (1993)). "Conversely," continued the court, "several unlisted semiautomatic rifles have unusual military-type features and appear, again to the untrained eye, unlikely sporting or working guns. *Id.* (citing Walter, Rifles of the World 384, 404, 442, 439 (2d ed. 1998)).

By definition, a classification is irrational if there is no difference between the subjects it includes and those it excludes. Even with respect to firearms that are not identical but merely comparable in size, magazine capacity, and rate of fire, however, the classifications made by the Legislature are irrational with respect not only to the Legislature's stated purpose, *see* § 12275.5,[8] but with respect to any conceivable legitimate governmental purpose.

Indeed, the factual allegations in the complaint, backed by the government's own documents, belie any rational basis for

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utilize the judicial add-on proceeding to bring some or even all of the clones within the Act's prohibitions at some point in the future does not remedy the present equal protection violation. Apart from the unconstitutionality of that process, *see supra*, Part I, unequal treatment is not permissible merely because at some point in the future the government might make the statute less unequal.

[8] Section 12275.5, titled "Legislative findings and declarations," provides in relevant part: "The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a *high rate of fire and capacity for firepower* that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (Emphasis added).

the Act's classification scheme. The firearms on the statutory list are less deadly, not more deadly, than other types of firearms, and the Act's backers in the legislature rejected a Department of Justice offer to gather data on the subject because the results were "unlikely to support the theses on which the legislation would be based," according to a DOJ internal memorandum. Amended Complaint ¶ 28. Quite obviously, the Legislature's own deliberate indifference to facts that destroy any pretense of rationality for the statutory classification is not entitled to the deference of this or any Court.

The Equal Protection Clause requires that a "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)); *see also Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause"); *Peoples Rights Organization*, 152 F.3d, at 532. The decision of the California Supreme Court is contrary to this well-established precedent.

B. The Decision of the California Supreme Court Broadens an Existing Conflict Among State Courts and at least one Federal Court of Appeals.

Quite apart from the fact that the California Supreme Court decision under review cannot be squared with the general Equal Protection principles that have been articulated by this Court, the decision—and like decisions by the Connecticut Supreme Court and the Eastern District of Michigan—is in conflict with the Sixth Circuit's decisions in *Springfield Armory*, 29 F.3d 250, and *Peoples Rights Organization*, 152 F.3d 522, as well as the decision of the

New York Supreme Court in *Citizens for a Safer Community* v. *City of Rochester*, 627 N.Y.S.2d 193 (N.Y. App. Div. 1994).

In *Springfield Armory*, the Sixth Circuit struck down a Columbus, Ohio ordinance that had been modeled on the California statute. As with California's statute, the City of Columbus, Ohio, banned a specified list of firearms but not other identical, or virtually identical firearms. The Sixth Circuit found the ordinance to be "fundamentally irrational" because it outlawed "certain brand names without including within the prohibition similar assault weapons of the same type, function or capability." 29 F.3d, at 252. As a result, the ordinance did not achieve its stated goal of getting assault weapons off the street. "The ordinance purports to ban 'assault weapons,'" noted the Sixth Circuit, "but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selection." *Id.*[9] The Sixth Circuit subsequently reiterated its position in *Peoples Rights Organization*, 152 F.3d 522.

There is also a direct conflict with the decision of the New York Supreme Court in *Citizens for a Safer Community*. The city ordinance at issue in the case, like the statute at issue here, defined a specific list of rifles and shotguns as prohibited "assault weapons" without listing identical firearms produced by other manufacturers. *Id.*, at 203. The court found that there was no support in the legislative record or in the exhibits introduced in the litigation "for the notion that there is a difference in the danger posed to society by identical guns produced by different manufacturers, and no such distinction can be found through an exercise of reason." *Id.*, at 204. The court then held that "to the extent [the ordinance]

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[9] The Sixth Circuit invalidated the ordinance as unconstitutionally vague, because plaintiffs had not raised an Equal Protection claim. Nevertheless, the language utilized by the Sixth Circuit unmistakably demonstrates that the Sixth Circuit also viewed the ordinance as a violation of Equal Protection clause, under rational basis review.

names individual weapons, and excludes others that are identical, it is a violation of the equal protection clause of the United States Constitution, and it may not be enforced by the City." *Id.*

In stark contrast, other courts have upheld similar "list" legislation against Equal Protection challenges, just as the California Supreme Court did below. Last March, the District Court for the Eastern District of Michigan upheld, under the Equal Protection component of the Fifth Amendment,[10] Title XI of the Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 921 *et seq.*, which makes criminal the manufacture, transfer, or possession of a specified list of "semiautomatic assault weapons" but not of other, virtually identical weapons. "[M]ere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment," held the court. *Olympic Arms* v. *Magaw*, 91 F. Supp. 2d 1061, 1073 (E.D. Mich. 2000) (quoting *New Orleans* v. *Dukes*, 427 U.S. 297 (1976)).[11] Finding that the prohibition of assault weapons was rationally related to the legitimate governmental purpose of protecting public safety, the court upheld the ordinance.[12]

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[10] *See Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954).

[11] Here, petitioners have contended that the Act's list is both under-inclusive (by irrationally excluding firearms that are identical or virtually identical to those on the list) and over-inclusive (by classifying as assault weapons firearms with vastly different characteristics). Amended Complaint ¶¶ 14-23.

[12] The Eastern District of Michigan appears to have misapplied the rational basis test, which addresses whether the *classification* is rationally related to a legitimate governmental purpose, not whether the *prohibition* is. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) ("a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis *for the classification*" (emphasis added)); *Romer*, 517 U.S., at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained"); *Peoples*

Similarly, in *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995), the Connecticut Supreme Court held that a similar "list" statute was valid under the Equal Protection Clause because plaintiffs "offered no evidence whatsoever suggesting that the legislature knew that any of the unproscribed weapons posed as great a threat to the welfare of the residents of this state as do the proscribed weapons." *Id.*, 662 A.2d, at 1238-39.[13]

Lurking behind this broadening split among the nation's courts is the allegation in petitioners' complaint, supported by documentary evidence and acknowledged by the California Supreme Court, that the real reason for the selective classification adopted by the Legislature was to avoid the political opposition that listing the more popular firearms would have generated. Amended Complaint ¶ 28; *see also* Pet. App. 14a (majority opinion) ("the Legislature was not constitutionally compelled to throw up its hands just because a perfectly comprehensive regulatory scheme was not politically achievable"); Pet. App. 42a (Brown, J., concurring)

Rights Organization, 152 F.3d, at 532. The Eastern District of Michigan did not address how the classification furthered the legislative purpose.

[13] *Benjamin* also highlights a developing split of authority on the issue whether the Equal Protection Clause even applies to a statutory classification of things rather than persons. Relying in part on *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), in which this Court allowed an Equal Protection challenge to a legislative classification between plastic and non-plastic milk containers, the California Supreme Court below held that it did. Pet. App. 4a. The Connecticut Supreme Court in *Benjamin* held that it did not, although it nonetheless proceeded to assess whether the classification was valid under the Equal Protection Clause. 662 A.2d, at 1235-36. *See also Olympic Arms*, 91 F. Supp. 2d, at 1070 (recognizing the split, siding with *Benjamin*, but then holding that the statutory classification was valid under the Equal Protection Clause, in any event). The decision below is more in accord with this Court's precedents. *See, e.g., Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("the dichotomy between personal and property rights is a false one. Property does not have rights. People have rights. *The right to enjoy property without unlawful deprivation*, no less than the right to speak or the right to travel, is in truth, a 'personal right'" (emphasis added)).

("the Legislature sought to satisfy its need to do something about gun violence without awakening the political enmity of a large and effective constituency"). As described by the California Department of Justice itself, in an internal memorandum prepared by the department's chief legislative liaison on the subject:

> *It was agreed that certain weapons probably had too large a constituency to ever be worth the risk of including* . . . . Most of the weapons on the [§ 12276] list are low production or long out of production items that constitute no conceivable threat.

Amended Complaint, Ex. B, at 2 (emphasis added). The point is made especially clear by Florida State University criminologist Gary Kleck, a leading authority on firearms violence, who observed that authors of "assault weapon" (AW) bans:

> have had to tackle the *difficult* task of developing a definition [of AWs] that simultaneously satisfied two conflicting requirements: (1) it identified the attributes that supposedly make AWs more dangerous than other guns, and (2) *was sufficiently limited so as not to restrict gun models popular among large numbers of voters*. . . . ¶ As a way out of this conflict, many policymakers have thrown up their hands and declined to identify the dangerous attributes of AWs. Instead, the proposed bills include long lists of specific makes and models of guns that have little in common. . . . Legislation passed in California . . . heterogeneous lists of specific gun models. ¶ The difficulties with this political compromise are obvious. . . [If AWs are especially dangerous,] it makes little crime control sense [though ample political sense] to systematically exclude the most widely owned models which have

these attributes, since this severely limits the impact of regulation.[14]

While the Legislature is free to take account of political considerations in deciding how much of a perceived problem to deal with legislatively, *cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), it is not free to selectively apply the law only to those with relatively little political power while leaving other, similarly situated individuals immune from the legislative prohibitions. Targeting a certain subset of firearms merely because their owners are politically powerless is simply not a legitimate governmental purpose. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

A classification that restricts the use of unpopular firearms while leaving more popular, virtually identical firearms unrestricted simply has no reasonable relationship to the legislature's stated purpose of furthering public safety, or any conceivable legitimate purpose, for that matter. Indeed, the only difference between many of the listed firearms from their unlisted counterparts is price—and the lower-priced firearms are on the *unlisted* side of the legislature, hardly a rational classification to further the legislature's stated purpose of countering the proliferation and use of firearms with a high rate of fire and capacity for firepower. Amended Complaint ¶¶ 16-23.

The legislative classification did have some purpose, of course. It allowed the legislature to restrict some firearms, and with the add-on mechanism, the Attorney General is now able to accomplish through the judicial back door what there was insufficient political support to accomplish in the

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[14] G. Kleck, Point Blank: Guns and Violence in America 71-72 (N.Y., Aldine, 1991) (emphasis added). This book has been hailed as the definitive treatise on gun control. *See, e.g.*, Mauser, 3 Crim. L. Forum 147 (1992); Kessler, 82 J. Crim. L. & Crimin. 1187 (1992); Ross, 98 American J. Soc. 661 (1992).

legislature. To our knowledge, the "any conceivable rationale" language of the rational basis test has never been understood to support classifications that further illegitimate purposes, and the end run around the political process is the height of illegitimacy. As the California Supreme Court has itself previously acknowledged:

> [T]here is no more effective guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Hays v. *Wood*, 603 P.2d 19, 26 (Cal. 1979) (quoting *Railway Express* v. *New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., conc.); *see also Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985).

Particularly because of the broadening split among the nations' courts on this important issue, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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DATED: December 14, 2000

IN THE SUPREME COURT OF CALIFORNIA

No. S069522

PETER ALAN KASLER et al.,
Plaintiffs and Appellants,

v.

BILL LOCKYER, as Attorney General, etc., et al.,
Defendants and Respondents.

Ct. App. 3 No. C017769
Sacramento County Super. Ct. No. CV519977

In enacting the Roberti-Roos Assault Weapons Control Act of 1989 (Stats. 1989, ch. 19, § 3, p. 64; hereafter AWCA), the Legislature imposed restrictions on a class of semiautomatic firearms it characterized as "assault weapons." (Pen. Code, § 12275 et seq.) The restrictions were necessary, the Legislature found and declared, because each of the semiautomatic firearms designated as an assault weapon had "such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (§ 12275.5.) It did not intend, the Legislature stressed, to place restrictions on weapons "primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (*Ibid.*)

Prior to amendment of the AWCA in 1999 (the 1999 amendments) (Stats. 1999, ch. 129, § 7 et seq.), semiautomatic firearms were designated as assault weapons by (1) being listed by type, series, and model in section 12276, or (2) by being declared an assault weapon under a procedure set forth in section 12276.5. Under the latter procedure, which is commonly referred to as the add-on provision, certain

superior courts, upon petition by the Attorney General, may be called upon to declare a firearm an assault weapon because of its essential similarity to a listed assault weapon. With its 1999 amendments to the AWCA, the Legislature took a third approach to designating assault weapons-defining them in section 12276.1, subdivision (a)(1)(A) in terms of generic characteristics, for example, a "semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine" and also has a "pistol grip that protrudes conspicuously beneath the action of the weapon." (Stats. 1999, ch. 129, § 7.) It bears repeating that the 1999 amendments were additive in this respect. Neither the list method of designating assault weapons in section 12276 nor the add-on provision of section 12276.5 was abandoned or textually modified by the 1999 amendments. This case arose prior to the enactment of the 1999 amendments, and the parties agree that the 1999 amendments do not render the issues before us moot.

Plaintiffs challenged the constitutionality of the AWCA in a taxpayers' suit to enjoin its enforcement. The trial court sustained a demurrer without leave to amend except as to one cause of action, and when plaintiffs declined to amend, dismissed the action. The Court of Appeal reversed. It held the AWCA unconstitutional on the following grounds: (1) the section 12276 list of assault weapons violates principles of equal protection because it is irrationally under-inclusive; (2) the add-on provision of section 12276.5 violates the separation of powers doctrine by delegating legislative power to the courts; and (3) the AWCA violates due process because it is unduly vague and fails to give advance warning of the conduct prohibited by it. We conclude the AWCA does not violate the equal protection or separation of powers doctrines and that the due process claim fails as a facial challenge to the AWCA. Accordingly, we reverse the judgment of the Court of Appeal. In the discussion that follows, we summarize the relevant provisions of the AWCA as we address each of plaintiffs' constitutional challenges. For the convenience of the reader, the full text of the relevant provisions of the AWCA as amended in 1999 may be found in the appendix.

I. Discussion

A. Equal Protection

In section 12276, the Legislature listed semiautomatic firearms-rifles, pistols, and shotguns-considered to be assault weapons, specifying such firearms by type, series, and model. Plaintiffs contend the AWCA violates the principles of equal protection embodied in the state and federal Constitutions because the Legislature failed to include in the section 12276 list certain weapons that are identical to, or indistinguishable from, listed weapons. The short answer to this argument, the Attorney General contends, is that the equal protection clauses of the federal and state Constitutions protect *persons*. Guns are things, not persons. Therefore, equal protection principles do not protect guns from unequal treatment.

The Attorney General's analysis finds some support in two recent cases: *Benjamin v. Bailey* (Conn. 1995) 662 A.2d 1226 (*Benjamin*), and *California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302 (*California Rifle*). In *Benjamin*, the Supreme Court of Connecticut, in the course of considering various constitutional challenges to an assault weapons ban, stated: "The equal protection clauses of the federal and state constitutions apply only to 'persons.' [Citations.] The plaintiffs' challenge relates to classifications among weapons, not persons. . . . Accordingly, the plaintiffs have not raised a claim that falls within the scope of the constitutional guarantee they seek to invoke." (*Benjamin*, *supra*, 662 A.2d at pages 1235-1237, fn. omitted.) In *California Rifle*, the Court of Appeal reached the same conclusion in upholding a city ordinance banning the sale of "Saturday Night Specials." "The general rule is that persons who are similarly situated in relevant respects must be treated equally by the law. Obviously, a handgun is not a person, and hence there is no constitutional compulsion for a state's laws to treat all handguns alike. . . . The equal protection clause simply does not protect guns from unequal legal treatment." (*California Rifle*, *supra*, 66 Cal.App.4th at p. 1326.)

Holding that only persons, not things, are protected from unequal legal treatment was something of a makeweight in

both cases because the courts went on to consider and reject the equal protection challenges on the merits. (See *Benjamin, supra*, 662 A.2d at pp. 1237-1240; *California Rifle, supra*, 66 Cal.App.4th at p. 1329.) As the Court of Appeal in this case noted, the argument made by the Attorney General "overlooks the fact that it is the persons who make and own guns who are penalized." The Connecticut Supreme Court in *Benjamin* acknowledged this point in rejecting the equal protection challenge raised there. "Even if the plaintiffs' argument were construed as an allegation that *people* who possess a listed firearm are treated differently from *people* who possess an unlisted firearm, and that this disparate treatment violates principles of equal protection, the plaintiffs would not prevail on the merits of this claim." (*Benjamin, supra*, 662 A.2d at p. 1237.) Courts not uncommonly refer to issues of equal protection as involving discrimination among things when they mean discrimination among persons having interests in those things. For example, in *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, a case that will be further discussed below, the United States Supreme Court characterized the controversy there as centering on "the narrow issue whether the legislative classification between plastic and nonplastic nonreturnable milk containers is rationally related to achievement of the statutory purposes." (*Id.* at p. 463, fn. omitted.) We have used such shorthand ourselves. (See, e.g., *Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 734 [a ban on pinball games, were it intended to proscribe games of skill, would constitute a denial of equal protection of the laws, "since there would be an arbitrary discrimination against the limited number of games of skill falling within its terms"].)

The shortcut suggested by the Attorney General having turned out to be blind alley, we must address plaintiffs' equal protection challenge on the merits, and the threshold question we confront is which standard of review applies. "In *D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1, we described the two principal standards or tests that generally have been applied by the courts of this state and the United States Supreme Court in reviewing classifications that are challenged under the equal protection clause of the Fourteenth

Amendment of the United States Constitution or article I, section 7, of the California Constitution. As the court in *D'Amico* explained: 'The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a "discrimination" or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and "requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." [Citation.] . . . Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it*.' (11 Cal.3d at pp. 16-17, italics in original.) [¶] The court in *D'Amico* further explained that '[a] more stringent test is applied . . . in cases involving "suspect classifications" or touching on "fundamental interests." Here the courts adopt "an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. [Citations.] Under the strict standard applied in such cases, *the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." [Citation.]' (11 Cal.3d at p. 17.)" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641, fn. omitted.)

Although plaintiffs assert the AWCA fails to satisfy even the rational basis test, they contend it should be reviewed under the "intermediate or even strict scrutiny standards of legal review" because "portions of the [AWCA] touch upon [an] express fundamental constitutional right." This fundamental right plaintiffs locate in article 1, section 1 of the California Constitution, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of

rights, they are simply wrong. No mention is made in it of a right to bear arms. (See *In re Rameriz* (1924) 193 Cal. 633, 651 ["The constitution of this state contains no provision on the subject."].) Moreover, "[i]t is long since settled in this state that regulation of firearms is a proper police function." (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 866.) We reject any suggestion that the regulations at issue here impermissibly infringe upon the right to defend life or protect property guaranteed by the California Constitution.

Therefore, as the AWCA does not burden a fundamental right under either the federal or the state Constitutions, the rational basis test applies. (See *Peoples Rights Organization, Inc. v. City of Columbus* (6th Cir. 1998) 152 F.3d 522, 531-533; *Coalition of New Jersey Sportsmen, Inc. v. Whitman* (D.N.J. 1999) 44 F.Supp.2d 666, 685; *California Rifle, supra*, 66 Cal.App.4th at p. 1329; *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1133; *In re Evans* (1996) 49 Cal.App.4th 1263, 1270.) This premise was challenged recently, insofar as the state Constitution is concerned, in *Warden v. State Bar*, *supra*, 21 Cal.4th 628. In *Serrano v. Priest* (1976) 18 Cal.3d 728, we had noted that "our state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality," and, "in a given case," we observed, the state provisions "may demand an analysis different from that which would obtain if only the federal standard were applicable." (18 Cal.3d at p. 764.) In *Warden*, a more sweeping question was raised-whether the rational relationship test adequately expresses the state constitutional guarantee. (*Warden v. State Bar*, *supra*, 21 Cal.4th at pp. 628, 660-667 (dis. opn. of Brown, J.) ["means scrutiny" is the appropriate test under the Cal. Const.].) The majority of this court, however, adhered to the rational relationship test and restated it as follows: "As both the United States Supreme Court and this court have explained on many occasions, '[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection

challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.] Where there are "plausible reasons" for [the classification] "our inquiry is at an end." ' (*FCC* v. *Beach Communications, Inc.* (1993) 508 U.S. 307, 313, italics added, quoting *U.S. Railroad Retirement Bd.* v. *Fritz* (1980) 449 U.S. 166, 179; see, e.g., *Central State University* v. *Amer. Assoc. of University Professors* (1999) [526] U.S. [124]; *Werner* v. *Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 130-132.) Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. (See, e.g., *American Bank & Trust Co.* v. *Community Hospital* (1984) 36 Cal.3d 359, 371; *Williamson* v. *Lee Optical Co., supra*, 348 U.S. 483, 489 ['Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'].)" (*Id.* at pp. 644-645.)

Mindful of the deference we must accord the Legislature under the rational basis standard, we review the circumstances giving rise to the AWCA. The crisis created by the proliferation and use of assault weapons was the subject of a session of the California State Assembly meeting as a Committee of the Whole on February 13, 1989. The purpose of the extraordinary session, Speaker of the Assembly Willie L. Brown, Jr., explained, was "to educate the entire membership of the California State Assembly" on the issue. (1 Assem. J. (1989-1990 Reg. Sess.) pp. 436-437.) "Ordinarily," Speaker Brown noted, "this would be done in a regular committee. On some occasions, when the issue is of such extraordinary importance, and of such immediacy, we [meet as] a Committee of the Whole." (*Id.* at p. 437.) Speaker Brown provided the context in which the regulation of assault weapons was being considered. "The shooting incident in Stockton, the drive-by

shootings that have been going on in Southern California at an alarming rate, the number of police officers who have been the victims of semi-automatic weapons, and the 'stats' that now show the alarming group of arrests that are taking place, and when items are confiscated, on many, many occasions those items have turned out to be semi-automatic weapons. A combination of all those things, plus the volume of editorials, the volume of public comment out there about the question, requires us to address the issues." (*Ibid.*)

The "shooting incident in Stockton" to which Speaker Brown alluded had occurred at the Cleveland Elementary School in Stockton, California, the month before the meeting of the Committee of the Whole. While 300 pupils, mostly kindergartners through third graders, were enjoying their lunchtime recess, Patrick Purdy, who had placed plugs in his ears to dull the sounds of what he was about to do, drove up to the rear of the school and stepped out of his car carrying a Chinese-made semiautomatic AK-47. "Impassively, Purdy squeezed the trigger of his rifle, then reloaded, raking the yard with at least 106 bullets. As children screamed in pain and fear, Purdy placed a 9-mm pistol to his head and killed himself. When the four-minute assault was over, five children, ages 6 to 9, were dead. One teacher and 29 pupils were wounded." (Chow, *Slaughter in a School Yard*, Time Magazine (Jan. 30, 1989) p. 29.)

The shooting at the Cleveland Elementary School in Stockton was only the latest of a series of terrifying incidents in California involving assault weapons. Five years earlier, in San Ysidro, James Huberty drove to a McDonald's restaurant "after announcing casually to his wife, 'I'm going to hunt humans.'" (Griggs & Ysidro, *Sudden Death; Mass Murder at a McDonald's*, Time Magazine (July 30, 1984) p. 90.) Stepping into the restaurant with a 9-mm Browning automatic pistol in his belt and a 12-guage shotgun and a 9-mm UZI semiautomatic rifle slung over his shoulders, Huberty called out, "'Everybody on the floor.' About 45 patrons were present. As they scrambled to comply, Huberty marched around the restaurant calmly spraying gunfire. . . . Maria Diaz ran out the side door in panic when the shooting started, then

remembered that her two-year-old son was still inside. She crept back to a window and saw him sitting obediently in a booth. She motioned him toward the door, nudged it open, and the boy toddled to safety." (*Ibid.*) Not everyone was so fortunate. After SWAT sharpshooters finally killed Huberty, "police and hospital workers moved in on the gruesome scene. A mother and father lay sprawled across their baby, apparently in an attempt to shield it. All three were dead." (*Ibid.*) The carnage was clearly far worse than it would have been had Huberty not been armed with semiautomatic weapons. He fired hundreds of rounds. "The gunfire was so heavy that police at first assumed that more than one gunman was inside. A fire truck took six shots before reversing direction and backing off. One fire fighter was grazed by a bullet that tore through the truck and then landed softly on his head." (*Ibid.*) In all, of the 45 patrons in the restaurant, Huberty killed 21 and wounded 15 others.

In the hearing before the Committee of the Whole, the lead-off speaker was Attorney General John Van de Kamp. Attorney General Van de Kamp testified that only the day before a woman and her unborn child in Los Angeles had been killed by a gang member with an assault weapon. He added: "There was another one down in Lynwood, a nineteen-year-old, who was killed the same day." (1 Assem. J. (1989-1990 Reg. Sess.) p. 438.) Increasingly, "the weapons of choice for this madness," he noted, were "semi-automatic military assault rifles." In Los Angeles, he said, it had "become fashionable among hard-core members of the Crips Gang to spray a stream of bullets in hopes of taking down one rival gang member, but infants and grandmothers may be killed as well. They say that the young killers even have a phrase for it. They say, 'I spray the babies to [the] eighties.' " (*Ibid.*)

Because assault weapons were unregulated, Attorney General Van de Kamp observed, law enforcement officials did not know how many of them there were in California. However, he added, "we do know that the numbers are going up at a frightening rate. Hard hit police departments have begun to keep records, like Oakland, where the number seized

has tripled in less than two years. Statewide, the number of semi-automatic weapons seized . . . by law enforcement has more than doubled in the last two years. . . . A partially completed Department of Justice survey with 132 law enforcement agencies reporting thus far has found the same pattern for semi-automatics actually used in crimes. The number has doubled in the last two years. The number used in shootings has gone up nearly 300%. Clearly, we are seeing an escalation in the arms race, and law enforcement is losing." (1 Assem. J. (1989-1990 Reg. Sess.) p. 439.)

Dr. Garen Wintemute of the University of California, Davis, Medical School appeared before the Committee of the Whole to testify with regard to the "special wounding characteristics" of the high velocity ammunition commonly used in assault weapons. (1 Assem. J. (1989-1990 Reg. Sess.) p. 447.) When a high velocity bullet enters the body, Dr. Wintemute explained, "it starts to 'tumble,' as it moves through the tissue . . . greatly increasing the amount of tissue which is damaged by direct contact with the bullet. Moreover, as this high-velocity missile travels through the tissue, it sends out pressure waves: We've all seen pictures of airplanes breaking the sound barrier, and waves moving away from the plane. The same thing happens as these bullets travel through tissue; these pressure waves . . . create what is called 'a temporary cavity' behind the path of the bullet, which may be 10 to 15 times-or even greater-the diameter of the bullet itself. [¶] As a result of this phenomenon, these high-velocity missiles can damage or destroy organs, break bones-including the femur, possibly the strongest bone in the body-without ever touching them." (*Ibid.*)

Lieutenant Bruce Hagerty, a Los Angeles police officer familiar with "gangs and the increasing use of assault weapons," also testified before the Committee of the Whole. (1 Assem. J. (1989-1990 Reg. Sess.) p. 450.) "Probably the most graphic example, for me, was on Good Friday of last year, where a rival gang entered a neighborhood in South Central Los Angeles and sprayed a crowd of forty to fifty people with an AR-15, and that's an American assault rifle, shooting 14 people, killing a 19 year old boy, hitting a five

year old little girl, and a 65 year old man, and all ages in between. I was the field commander of that situation, and I'm here to tell you that that was, in every sense of the word, a war scene. . . . There were bodies everywhere and people were terrified, and the only reason that this gang did that was to terrorize the neighborhood because they wanted to take it over and be able to sell drugs in that neighborhood, and the military assault rifle is the vehicle that they used. [¶] . . . I'm here to tell you that there's only one reason that they use these weapons, and that is to kill people. They are weapons of war." (*Ibid.*)

The sponsors of the AWCA were Senator David A. Roberti and Assemblyman Mike Roos. Originally, both Senate Bill No. 292 (1989-1990 Reg. Sess.) (Senate Bill 292), introduced by Senator Roberti, and Assembly Bill No. 357 (1989-1990 Reg. Sess.) (Assembly Bill 357), introduced by Assemblyman Roos, defined assault weapons generically. As amended in the Senate on January 31, 1989, Senate Bill 292 defined "assault weapons" to include, for example, "[a]ll semiautomatic action, centerfire rifles that accept detachable magazines with a capacity of 20 rounds or more." The parallel provision of Assembly Bill 357, as amended in the Assembly on February 27, 1989, was identical. Although a majority in the Senate favored the approach of defining assault weapons generically, that approach was not acceptable to a majority of the Assembly. In the Assembly Public Safety Committee, the fate of Assembly Bill 357 was expected to turn on the vote of Assemblyman Charles W. Quackenbush, who was quoted as saying, " 'As it stands right now, I am against [the legislation]. There would have to be major changes for me to support it.' " According to the Los Angeles Times, "Quackenbush and other opponents say the bills would ban some legitimate hunting rifles as well as assault weapons and say they could support a measure that contained a more exact definition of assault weapons." (Ingram, *State Anti-Gun Measures Facing an Uncertain Fate*, L.A. Times (Feb. 24, 1989) p. I32, cols. 3-4.)

On February 28, 1989, Assembly Bill 357 was approved by the Assembly Public Safety Committee "with no votes to

spare." (Ingram & Gillam, *Assault Gun Ban Gains in Legislature*, L.A. Times (Mar. 1, 1989) p. I1, col. 1.) The committee's action "followed acceptance by Roos of amendments proposed by Quackenbush that eliminated a broad definition of what constituted an assault rifle. Substituted in its place was a list of about 40 rifles, shotguns and pistols that would be specifically banned by manufacturer and model, including the AK-47 and Uzi." (*Id.* at p. I21, cols. 3-4.) Senate Bill 292, which retained the generic definition approach, was approved by the Senate Judiciary Committee the same day. (*Id.* at p. I1, col. 4; see Sample & Richardson, *State Ban on Assault Weapons Gains*, Sacramento Bee (Mar. 1, 1989) p. A1.)

On March 9, 1999, Senate Bill 292 was approved by the Senate. Governor George Deukmejian expressed misgivings about the generic definition approach in the Senate bill, indicating that he favored the list approach taken by the Assembly. (Ingram, *State Senate Votes to Ban Assault Guns*, L.A. Times (Mar. 10, 1989) p. I1, col. 3; see Matthews, *Gun Ban Breezes in Senate/NRA Predicts Ban Will Die in Assembly*, Sacramento Bee (Mar. 10, 1989) p. A1.) On March 13, 1989, the Assembly passed Assembly Bill 357, with its list approach "on a 41-38 vote, the exact simple majority required in the 80-member chamber." (Ingram & Gillam, *Assembly Passes Assault Gun Ban*, L.A. Times (Mar. 14, 1989) p. I1, col. 5.) On April 4, 1989, Senate Bill 292 was amended by the Assembly Public Safety Committee to substitute the list approach for the generic definition approach, and as so amended, was approved by the committee. The same day the Senate Judiciary Committee approved Assembly Bill 357. (Ingram, *Tougher of 2 Bills to Outlaw Assault Rifles Is Weakened by Panel*, L.A. Times (Apr. 5, 1989) p. I3, col. 5; Sample, *Panel Narrows, OKs Assault-Weapons Ban*, Sacramento Bee (Apr. 5, 1989) p. A3.)

On May 15, 1989, a Senate Assembly conference committee "ratified a compromise with Gov. George Deukmejian," one element of which was a provision "aimed at ridding from the marketplace facsimile assault arms that are so close to being the real thing that they constitute an assault weapon. It

would be up to the state attorney general to persuade a Superior Court judge that such was the case before the facsimile could be added to the list of banned guns." (Ingram, *Panel Votes Compromise on Assault Weapons Ban*, L.A. Times (May 16, 1989) p. I3, col. 5; see Sample, *Conferees Approve Gun-Ban Compromise*, Sacramento Bee (May 16, 1989) p. A3.) On May 18, 1989, both the Assembly and the Senate approved the bill and sent it to the Governor. In the Assembly, it had again obtained just 41 votes, the bare majority required for approval. (Ingram, *Assault Gun Ban Wins Final Vote,* L.A. Times (May 19, 1989) p. I1, col. 5.) On May 24, 1989, Governor Deukmejian signed the legislation. " 'It's well known that some drug dealers and violent gang members are using assault-type weapons,' the governor said before signing the measures. [¶] 'In the face of such firepower, our state's courageous law enforcement officers need all the help that we can give them as they seek to preserve our public safety,' he said." (Sample, *Duke Signs into Law Ban on Most Assault Arms*, Sacramento Bee (May 25, 1989) p. A1.)

In seeking to address the grave threat to public safety posed by the possession and use of assault weapons by criminals, the Legislature was clearly walking a tightrope. Anti-gun-control groups like the National Rifle Association were adamantly opposed to an assault weapons ban, regardless of the approach taken-generic definition or list. (See, e.g., Matthews, *Biggest Gun-Ban Shootout Remains: Combining Two Bills*, Sacramento Bee (Mar. 27, 1989) p. A1.) On the other hand, a spokesman for the California Police Chiefs Association said neither bill went far enough. (*Ibid.*) Of the two approaches, many proponents of an assault weapons ban preferred a generic definition. Attorney General Van de Kamp, for example, warned that manufacturers could get around a list merely by renaming a firearm or making simple cosmetic changes in the weapon's design. (Ingram & Gillam, *Assault Gun Ban Gains in Legislature*, L.A. Times, *supra*, p. I21, cols. 4-5.) However, key figures like Governor Deukmejian and Assemblyman Quackenbush were concerned the proposed generic definition would sweep too broadly-that

it would ban semiautomatic weapons used for legitimate sports and recreational purposes. The bottom line, apparently, was that an assault weapons ban would have died in the Assembly that session, had the proponents insisted on defining assault weapons generically.

The perfect can be the enemy of the good. The Legislature was convinced that "the proliferation and use of assault weapons poses a threat to the health, safety and security of all citizens of this state." (§ 12275.5.) Given that conviction, the Legislature was not constitutionally compelled to throw up its hands just because a perfectly comprehensive regulatory scheme was not politically achievable. " ' "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." ' " (*Dallas v. Stanglin* (1989) 490 U.S. 19, 27, quoting *Metropolis Theatre Co. v. City of Chicago* (1913) 228 U.S. 61, 69-70.)

The rough accommodations the Legislature made here are explained in its findings and declarations. "The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (§ 12275.5.)

The Legislature was, in short, confronted with two conflicting societal interests, both of which it recognized as legitimate-the interest of all citizens in being protected against the use of semiautomatic weapons by criminals, and the interest of some citizens in using semiautomatic weapons for hunting, target practice, or other legitimate sports or

recreational activities. Seeking to accommodate these conflicting interests, the Legislature decided to list the models of semiautomatic weapons that were to be considered assault weapons. It chose the list approach, the Legislature declared, "because it was the most effective way to identify and restrict a specific class of semiautomatic weapons." (§ 12276, subd. (f).) The Legislature was not unmindful of the fact that the section 12276 list was not, and could not be, complete. In its uncodified findings and declarations, the Legislature explained that the add-on provision was intended to compensate for the inherent limitations of the list approach. "It is the intent, therefor[e], to ban the weapons enumerated in Section 12276 of the Penal Code and any other models which are only variations of these weapons, which are the same weapon but manufactured or sold by another company under a licensing agreement, or which are new models manufactured or sold by any company with just minor modifications or new model numbers in order to circumvent the prohibitions of Chapter 2.3 (commencing with Section 12275) of Title 2 of Part 4 of the Penal Code." (Stats. 1989, ch. 18, § 6, p. 59.)

The step-by-step approach adopted here-the list plus the add-on provision-does not violate principles of equal protection. As previously stated, both the United States Supreme Court and this court have recognized the propriety of a legislature's taking reform " 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' " (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 645, quoting *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489.) "[A] legislature need not run the risk of losing an entire remedial scheme because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (*McDonald v. Board of Election* (1969) 394 U.S. 802, 809.)

In *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. 456, the State of Minnesota banned retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitted such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. Defending the statute against an equal protection challenge, the state acknowledged

evidence that the plastic milk jug was the most popular, and the paperboard carton the most cumbersome and least well-regarded package in the industry, but argued that the ban on plastic nonreturnables would buy time during which environmentally preferable alternatives might be further developed and promoted. Rejecting this rationale, the Minnesota District Court found that the statute was actually intended to promote the economic interests of certain segments of the dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy and plastics industries. The Minnesota Supreme Court affirmed, striking down the statute on equal protection grounds and expressing doubt that the state would have taken any further steps to promote environmentally sound milk packaging. The high court reversed. "We find the State's approach fully supportable under our precedents. This Court has made clear that a legislature need not 'strike at all evils at the same time or in the same way,' *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935), and that a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.' *New Orleans* v. *Dukes*, 427 U.S., at 303. [Citations.] The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use." (449 U.S. at p. 466.)

The principles of equal protection analysis reiterated in *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. 456, have been applied in a variety of contexts. For example, in *United States v. Kiffer* (2d Cir. 1973) 477 F.2d 349, the court of appeals rejected the argument that the Comprehensive Drug Abuse Prevention and Control Act of 1970 was irrationally underinclusive. Even if it were true, as appellants contended, that marijuana was less harmful than legally available substances such as tobacco and alcohol, "this does not render the statute here unconstitutional," the court of appeals held. (*Id.* at p. 355.) "If Congress decides to regulate

or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none. [Citations.]" (*Ibid.*; accord, *National Organization for Reform of Marijuana Laws v. Gain* (1979) 100 Cal.App.3d 586, 593-594.) In *Sherwin-Williams v. City & Co. of San Francisco* (N.D. Cal. 1994) 857 F.Supp. 1355, manufacturers and retailers of markers and spray paint challenged the constitutionality of the city's "lock up" antigraffiti ordinance, which prohibited retailers from displaying markers and spray paint for sale unless they were maintained in places accessible only with employee assistance. The court rejected plaintiffs' contention that the ordinance was irrationally underinclusive because it did not restrict access to other products that might be used to create graffiti. "In drafting anti-graffiti legislation, there was nothing irrational about the Board of Supervisors' decision to focus its energies on the most commonly used graffiti implements, rather than striking out at once at all of the available substitutes." (*Id.* at p. 1372.)

Of the cases involving equal protection challenges to assault weapons bans, the Attorney General relies on *Benjamin*, *supra*, 662 A.2d 1226, while plaintiffs rely on *Springfield Armory, Inc. v. City of Columbus* (6th Cir. 1994) 29 F.3d 250 (*Springfield Armory*). In *Benjamin*, the plaintiffs challenged a list-type assault weapons ban on the ground, among others, that it was irrationally underinclusive because it failed to include weapons that were virtually identical to listed weapons. Not surprisingly, given the nationwide character of the debate over gun control, the Connecticut Legislature faced the same sorts of political constraints as did the California Legislature, and like the California Legislature finally settled for a compromise it knew to be imperfect. One Connecticut senator said, " 'If we restrict the list, we're damned because of the guns we left out. If we expand the list, we're damned for the guns we keep in.' " (*Benjamin*, *supra*, 662 A.2d at p. 1239, fn. 12.) Another admitted: " 'This is not the perfect bill. It's not the solution, but it's a step in the right direction.' " (*Ibid.*) Appreciating the dilemma faced by its legislature, the Supreme Court of Connecticut rejected the

equal protection challenge. "The legislature . . . is not restricted in its options either to banning all weapons it considers harmful to the welfare of the citizenry or to banning none at all." (*Ibid.*, fn. omitted.)

In *Springfield Armory*, *supra*, 29 F.3d 250, the Sixth Circuit Court of Appeals struck down a list-type assault weapons ordinance as unconstitutionally vague, no equal protection claim having been raised. "[T]he ordinance is fundamentally irrational . . . . The Columbus ordinance outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. The ordinance does not achieve the stated goal of the local legislature-to get assault weapons off the street. The ordinance purports to ban 'assault weapons' but in fact bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections. Many assault weapons remain on the market . . . ." (*Id.* at p. 252.)

We are not persuaded by *Springfield Armory*. Doubtless, 10 years after the AWCA became law in California many semiautomatic weapons potentially classifiable as assault weapons remain on the market here. That may or may not be regrettable, depending upon one's views on this highly charged public policy question, but it does not amount to a constitutionally fatal flaw in the AWCA. As the high court pointed out in the context of the packaging legislation it reviewed in *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at page 466: "Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives." The Legislature here was under no illusion that the AWCA would rid the streets of assault weapons in one fell swoop. Instead, the Legislature intended that the approach it finally settled upon in the AWCA-designating certain assault weapons by type, series, and model, while providing a mechanism for adding others "which are only

variations of these weapons, which are the same weapon but manufactured or sold by another company under a licensing agreement, or which are new models manufactured or sold by any company with just minor modifications or new model numbers in order to circumvent the [AWCA's] prohibitions" (Stats. 1989, ch. 18, § 6, p. 59)-would make California a safer place, even if only marginally and incrementally. We are not prepared to say that the Legislature's expectation was irrational or that, to pass constitutional muster, its ambitions had to be grander.

B. Separation of Powers

Plaintiffs contend, and the Court of Appeal agreed, that the add-on provision of section 12276.5 violates the separation of powers doctrine. After reviewing the fundamental policies that inform the separation of powers jurisprudence of this court and the United States Supreme Court, we reject this challenge.

"An unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy. (*Kugler* v. *Yocum* (1968) 69 Cal.2d 371, 376-377.)" (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.)

The delegation here, the Court of Appeal concluded, suffers from a defect of the second sort-the failure to provide adequate direction for the implementation of legislative policy. "[B]y what reasoning," the Court of Appeal asked, "does a judge determine whether a gun is merely 'redesigned' from another or has modifications or enhancements which are but 'slight?' What is 'slight' enough or 'redesigned' enough?"

Actually, the role that the courts play in implementing the add-on procedure is a very narrow, essentially adjudicatory one. The Attorney General initiates the add-on procedure by filing a petition in certain superior courts seeking a declaration of "temporary suspension of the manufacture, sale, distribution, transportation, importation into the state, or the

giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276." The grounds for such a declaration are that the firearm is either of the following: "(1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in [subdivision] (a), (b), or (c) of Section 12276 which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount. The court shall strictly construe this paragraph so that a firearm which is merely similar in appearance but not a prototype or copy cannot be found to be within the meaning of this paragraph. [¶] (2) A firearm first manufactured or sold to the general public in California after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, regardless of the company of production or distribution, or the country of origin." (§ 12276.5, subd. (a).)

At the hearing on a permanent declaration, the burden of proof is on the Attorney General to show by a preponderance of the evidence that the firearm is an assault weapon. If the court finds that the firearm comes within the criteria set forth in subdivision (a) of section 12276.5, the court "shall issue a declaration that it is an assault weapon under Section 12276. Any party to the matter may appeal the court's decision." (§ 12276.5, subd. (f).)

It is instructive to contrast the essentially adjudicatory determination that section 12276.5 calls upon the superior court to make with the much more policy-laden, quasi-legislative determinations that were nevertheless upheld in the face of separation of powers challenges by the U.S. Supreme Court in *Mistretta v. United States* (1989) 488 U.S. 361

(*Mistretta*), and by this court in *People v. Wright* (1982) 30 Cal.3d 705 (upholding the delegation of authority to the Judicial Council to promulgate sentencing guidelines).

In *Mistretta*, the high court reviewed the constitutionality of the Sentencing Reform Act, under which Congress delegated authority to the Sentencing Commission to promulgate sentencing guidelines for federal criminal offenses, placed the commission within the judicial branch, and required federal judges to serve on it along with nonjudges. In upholding the Sentencing Commission against a separation of powers challenge, the court acknowledged that the Sentencing Commission was "unquestionably . . . a peculiar institution within the framework of our Government," but went on to say that "[o]ur constitutional principles of separated powers are not violated, however, by mere anomaly or innovation." (*Mistretta*, *supra*, 488 U.S. at pp. 384-385.)

It is concern about " 'encroachment and aggrandizement,'" the court reiterated in *Mistretta*, that has animated its separation of powers jurisprudence. (*Mistretta*, *supra*, 488 U.S. at p. 382.) "Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. . . . By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." (*Id.* at p. 382.) Applying these principles, the court upheld the Sentencing Reform Act after measuring it against the following standard: "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." (*Id.* at p. 388.)

The delegation here satisfies this standard. None of the three branches is aggrandized by the delegation or encroached upon by it. And the authority delegated to the superior court-to serve as a check on the power delegated to the executive branch by reviewing the question whether a firearm the

Attorney General wishes to add to the list of assault weapons satisfies the criteria set forth in section 12276.5-is appropriate to the central mission of the judiciary. Admittedly, having the court conduct the review as the final act in the exercise of a legislatively delegated power is, in the language of *Mistretta*, "peculiar," but as that case reminded us, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." (*Mistretta*, *supra*, 488 U.S. at pp. 384-385.)

What Mistretta's argument really came down to, the Supreme Court said, was not that the substantive responsibilities of the Sentencing Commission aggrandized the judicial branch, "but that that Branch is inevitably weakened by its participation in policymaking." (*Mistretta*, *supra*, 488 U.S. at p. 395.) This concern, the high court held, was not well founded with regard to the Sentencing Commission. "We do not believe . . . that the placement within the Judicial Branch of an independent agency charged with the promulgation of sentencing guidelines can possibly be construed as preventing the Judicial Branch 'from accomplishing its constitutionally assigned functions.' *Nixon* v. *Administrator of General Services*, 433 U.S., at 443. Despite the substantive nature of its work, the Commission is not incongruous or inappropriate to the Branch. As already noted, sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment. What we said in *Morrison* when upholding the power of the Special Division to appoint independent counsel applies with even greater force here: 'This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise.' 487 U.S., at 676, n. 13. On the contrary, Congress placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise." (*Id.* at pp. 395-396.)

The same may be said here, that is, this is not a case in which judges are given power in an area in which they have no special knowledge or expertise, but rather a case in which the Legislature turned to the courts precisely because of their special knowledge and expertise in reviewing questions of the sort at issue in a section 12276.5, subdivision (f), hearing-

whether a firearm alleged by the Attorney General to be an assault weapon comes within the criteria set forth in section 12276.5, subdivision (a). Moreover, the amici curiae supporting the Attorney General contend that the fact the Legislature divided the authority it delegated between the executive and judicial branches, instead of confiding the whole of it to the Attorney General, should not be considered a fatal flaw in the AWCA, but rather a virtue. The amici curiae have a point. For the Legislature to set up the courts as a check upon the exercise of power it is delegating to the Attorney General is, in itself, perfectly in keeping with the separation of powers doctrine, the primary purpose of which is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 596; *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76; *Parker v. Riley* (1941) 18 Cal.2d 83, 89.)

However, it may be objected, the separation of powers doctrine not only guards against the concentration of power in a single branch of government; it also protects one branch against the overreaching of the others. (See *In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 596; *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) The Court of Appeal found overreaching in this delegation. "The Legislature cannot bestow legislative power on judges. For example, in *Epperson* v. *Jordan* (1938) 12 Cal.2d 61, the California Supreme Court invalidated statutes which tried to draft members of this court to write titles for initiative measures because 'they purport to confer nonjudicial duties on the appellate justices . . . .' "

Was the Legislature here guilty of the overreaching we condemned in *Epperson*? The rationale of our decision, we said in *Epperson*, *supra*, 12 Cal.2d at page 64, "need not be discussed at length. The principles involved have recently and exhaustively been considered by this court in *Abbott* v. *McNutt* [(1933)] 218 Cal. 225.)" In *Abbott v. McNutt*, *supra*, 218 Cal. 225, this court reviewed the constitutionality of a county charter provision that judges of that county, or their

nominees, were to serve as members of a " 'qualification board' " to recruit and submit to the board of supervisors candidates for the position of county executive. Although we mentioned the nondelegation doctrine, our decision did not turn on it. (*Id.* at p. 228.) Instead, we held that service on the qualifications board would have violated the prohibition of article VI, section 18 of the California Constitution against judges holding "any other office or public employment" during their judicial term. The "purpose and policy" underlying this constitutional prohibition, we observed, was cogently stated by Justice Cardozo in *In re Richardson* (1928) 247 N.Y. 401 [160 N.E. 655]. " 'The policy is to conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.' In other words, it is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions." (*Abbott v. McNutt*, *supra*, 218 Cal. at p. 229, quoting *In re Richardson*, *supra*, 160 N.E. at p. 661.) Service on the qualification board, we noted, might involve the county's judges "in those 'entanglements' and subject them to those 'partisan suspicions' of which the constitutional inhibition, in its wisdom, seeks to free them." For example, they might one day have been required to try charges of misfeasance against a county executive they had recommended as qualified. (*Abbott v. McNutt*, *supra*, 218 Cal. at p. 230.)

Was the policy that informed our decisions in *Epperson* and *Abbott*-the policy, in the words of Justice Cardozo, "to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties"-violated by the delegation here? (*In re Richardson*, *supra*, 160 N.E. at p. 661.) Insofar as the first prong of Justice Cardozo's stricture is concerned-conserving the time of judges for the performance of their work-any violation was de minimis, certainly as measured against the facts of *In re Richardson*. In that case, the Governor of New

York, pursuant to statutory authorization, directed a New York judge to take evidence and report to him as to whether the president of the Borough of Queens should be removed. In holding that the judge was disqualified, while retaining judicial office, from acting as the governor's delegate in such a matter, Justice Cardozo observed that the inquiry had "already separated the respondent for more than two months from the discharge of his judicial duties, and . . . is likely to continue [to do so] for many weeks to come. . . . Interference so prolonged with assignments to judicial duty is the very evil that was meant to be hit by the prohibitions of the [New York] Constitution directed against dual office." (*Ibid.*)

The duties imposed upon the judicial officers in *Epperson* and *Abbott* were not nearly as time-consuming as those in *In re Richardson*, but they still posed an unacceptably high risk of " ' "entanglements" ' " and " ' "partisan suspicions." ' " (*Abbott v. McNutt, supra*, 218 Cal. at p. 230.) Does the delegation here carry a significant risk of that sort? It might well, if the judge were called upon to *initiate* the process of adding firearms to the list of assault weapons, but that role is played by the Attorney General under section 12276.5, and the court plays its familiar role of reviewing a legal question-whether the criteria set forth in the statute were satisfied.

A related concern is whether the role the Legislature assigned to the courts in section 12276.5 will undermine the public's confidence in the *impartiality* of the judiciary. A concern in this regard led the Eleventh Circuit to hold that the appointment of two article III judges to the Organized Crime Commission, which was to advise the President and the United States Attorney General of actions that could be taken to improve law enforcement efforts directed against organized crime, violated the separation of powers doctrine. "Impartiality is one of the central, constitutionally-ordained, requirements of the federal judicial office, . . . and this impartiality is threatened by many of the activities of the Commission. A judge who is charged with assisting and improving enforcement efforts against organized crime must adopt a pro-government perspective which is ill-suited to his obligation to be neutral in the courtroom. The kind of information he

might uncover through the investigatory activities of the Commission would further endanger his impartiality. If the data and testimony surveyed by the Commission were to demonstrate, for example, that the magnitude of the threat posed by organized crime was greater than had previously been suspected, that a substantial amount of organized crime activity was never prosecuted, or that law enforcement officials in many parts of the country employed methods which were poorly chosen, subject to abuse or inadequate to combat the problem, such discoveries could affect the way the judge approached those organized crime suspects and law enforcement officials who appeared before him. Moreover, even if a judge could satisfy himself that he could separate his participation on the Commission from his judicial functions, it is not clear that litigants could sustain equal faith in his impartiality." (*Application of President's Com'n on Crime* (11th Cir. 1985) 763 F.2d 1191, 1197.)

The duty imposed upon the courts here, reviewing the question whether a firearm the Attorney General wishes to add to the list of assault weapons satisfies the criteria set forth in section 12276.5, clearly does not raise the same sorts of concerns with regard to impartiality that service on the Organized Crime Commission did. Moreover, the Third Circuit did not share the concern of the Eleventh Circuit that such service would undermine the impartiality of the judiciary in fact or appearance. (See *Matter of President's Com'n on Organized Crime* (3d Cir. 1986) 783 F.2d 370 (*Scarfo*).) A separation of powers challenge involving the conferral of power upon the judicial branch, the Third Circuit said, should be reviewed in terms of the functional analysis set out in *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 443; that is, the focus should be upon the extent to which the challenged action prevents the judiciary from accomplishing its constitutionally assigned functions. (*Scarfo*, *supra*, 783 F.2d at p. 375.) The service of two judges on the Organized Crime Commission "does not disable any other Article III judge or any court from performing properly assigned duties. In the event of recusals there will be a substitution of Article III judges and the work of the courts

will not be impaired. [¶] . . . What is present here is a limited dislocation and not one which would require reassignment of a large number of cases." (*Id.* at p. 381.) The same holds true here. Under section 12276.5, subdivision (a), the Attorney General may file a temporary suspension petition only in superior courts of counties with a population of more than 1,000,000, and the likelihood that a judge would be called upon to try a prosecution under the AWCA involving a firearm of a sort that she or he had earlier declared an assault weapon under section 12276.5 is remote, so any recusals occasioned by section 12276.5 should not be disruptive.

Finally, some commentators perceive in legislative bodies a tendency to *duck* controversial issues, and upholding a delegation of this sort will only encourage that tendency, they would argue. His dissents in *Morrison v. Olson* (1988) 487 U.S. 654, 697 and *Mistretta*, *supra*, 488 U.S. 361, 413, suggest Justice Scalia might be in this camp. In criticizing the legislative veto, then-Professor Scalia deplored the inclination he found in Congress to delegate political judgments it considered "too hot to handle." Title IX of the Education Amendments of 1972 was a good example of this tendency, he suggested. "It was apparent when that law was passed that its concrete application would arouse heated controversy over precisely such issues as all-male sports, unisex dorms, and even unisex toilets. Was it not more appealing for Congress to take the high road, winning approval from all sides by being against 'sex discrimination'-and leaving to the agencies the inevitable alienation of one or another constituency which accompanies the act of giving that term content?" (Scalia, *The Legislative Veto: A False Remedy for System Overload* (Nov.-Dec. 1979) Regulation, pp. 19, 24.) We must not assume, however, that such unworthy motives prompt a delegation. As Judge Carl McGowan of the District of Columbia Circuit noted, while Congress may "fix[] upon broad delegation for reasons of internal political maneuver or as an escape from having to stand up and be counted," most delegations are legitimate responses to the fact that Congress, "in an increasingly complex and changing world, is called upon to deal with subject matter that is novel and imprecise,

and for which it is frequently ill-equipped to do more than to paint with a broad brush, leaving the details to be filled in by less unwieldy and more expert administrative authority." (McGowan, *Congress, Court and Control of Delegated Power* (1977) 77 Colum. L.Rev. 1119, 1128-1129.) The delegation in the present case is manifestly of the latter sort. For good or ill, the Legislature stood up and was counted on this issue, one of the most contentious in modern society. The task it delegated-amending the list of assault weapons to capture the protean modifications of the weapons-was one it could not reasonably be expected to perform itself.

C. Due Process

A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; *People v. Heitzman* (1994) 9 Cal.4th 189, 199.) Section 12276.5 violates this standard, the Court of Appeal held, "because it defines the weapons which can be added on as those with 'slight' modifications and those which have been 'redesigned, renamed, or renumbered' from guns on the list. (§ 12276.5, subd. (a)(1), (2).) Reasonable persons can understand renaming and renumbering. But what is a 'slight' modification or a 'redesign?' "

The questions raised by the Court of Appeal are not questions ordinary citizens must answer at their peril. Rather, they are questions the Attorney General must address in deciding whether to petition the superior court for a declaration of temporary suspension (§ 12276.5, subd. (a)), and that the superior court must resolve in determining whether to issue a permanent declaration that a firearm is an assault weapon (§ 12276.5, subd. (f)). If the superior court issues a permanent declaration that a specified firearm is an assault weapon, then the Attorney General must, within 90 days, promulgate an amended list of the firearms designated as assault weapons in section 12276, or added to the list pursuant to section 12276.5, and the amended list must be filed by the Attorney General with the Secretary of State for

publication in the California Code of Regulations. (§ 12276.5, subd. (h).) Therefore, concerned citizens need not struggle with the question whether, for example, a particular firearm is identical to one of the listed assault weapons except for slight modifications. The citizens may simply consult the amended list. (The availability of the amended list distinguishes the cases upon which the Court of Appeal relied in holding the AWCA unconstitutionally vague-*Springfield Armory*, *supra*, 29 F.3d 250, and *Robertson v. City and County of Denver* (Colo. 1994) 874 P.2d 325.) Because the standard set forth in section 12276.5, subdivision (a), is to be applied by the Attorney General and the superior court, we need not and do not reach the question whether it would be unconstitutionally vague if ordinary citizens were required to apply it.

The Court of Appeal held the AWCA violates due process in a second respect: "[T]he Act deprives citizens of notice of the law because there is a temporal gap between the declaration of suspension and publication of notice thereof. During that period of time the Act treats the gun as an 'assault weapon,' meaning a person could be a felon for lending it to a fellow hunter. . . . But at that moment in time, the new 'list' has yet to be published to the world. There is literally no 'notice' of the law."

As to this challenge, the Attorney General defends the AWCA on a number of grounds, not all of them consistent with one another. First, the Attorney General argues that the giving or lending of a firearm during the "temporal gap" would never be the subject of a temporary suspension order. As the Attorney General notes, section 12276.5, subdivision (a), contains disjunctive clauses: "Upon request by the Attorney General . . . , the superior court shall issue a declaration of temporary suspension of the manufacture, sale, distribution, transportation or importation into the state, *or* the giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276 because the firearm" satisfies the criteria set out in paragraphs (1) and (2) of subdivision (a). (Italics added.) Seizing upon the disjunction, the Attorney General argues: "Only the Attorney General

determines whether one or both of these groups will be subject to the temporary suspension. The reason for a temporary suspension is to prevent distribution of weapons declared to be assault weapons during the pendency of the [permanent suspension] hearing. . . . It seems illogical to assume that the Attorney General will choose to apply a temporary suspension to individuals who already possess the weapon." (Italics omitted.) Illogical, perhaps, but not inconceivable. The Legislature apparently felt it important, and not illogical, to give the Attorney General the authority to temporarily suspend the giving or lending of a firearm alleged to be an assault weapon, so we cannot with confidence assume the Attorney General would never use that authority.

The Attorney General next argues that even if the giving or lending of a firearm alleged to be an assault weapon were temporarily suspended, the hunter in the Court of Appeal's hypothetical would receive constructive notice of the temporary suspension order pursuant to section 12276.5, subdivision (c).

Subdivision (c) of section 12276.5 provides: "Upon declaration of temporary suspension, the Attorney General shall immediately notify all police, sheriffs, district attorneys, *and those requesting notice pursuant to subdivision (d)*, shall notify industry and association publications for those who manufacture, sell, or use firearms, *and shall publish notice in not less than 10 newspapers of general circulation in geographically diverse sections of the state* of the fact that the declaration has been issued." (Italics added.) Subdivision (d) of section 12276.5 provides in pertinent part: "The Attorney General shall maintain a list of any persons who request to receive notice of any declaration of temporary suspension and shall furnish notice under subdivision (c) to all these persons immediately upon a superior court declaration." Subdivision (b) of section 12276.5 provides that upon the issuance of a declaration of temporary suspension "and after the Attorney General has completed the notice requirements of subdivisions (c) and (d)," the penalty provisions of subdivision (a) of section 12280 shall apply with respect to the weapons subject to the temporary suspension declaration.

And finally, subdivision (a)(1) of section 12280 makes it a felony for a person to manufacture, distribute, transport, import, sell, possess, or lend an assault weapon in this state, except as provided in the AWCA.

Plaintiffs object that an ordinary gun owner is not likely to request notice of temporary suspensions pursuant to subdivision (d) of section 12276.5, and that constructive notice in newspapers is not constitutionally adequate. Amici curiae in support of the Attorney General respond, "gun owners can hardly be heard to complain about the unfairness of a statute which gives them the extraordinary right to receive from the Attorney General, upon request, specific notice of a temporary suspension." After all, amici curiae note, "California law attributes to all citizens constructive knowledge of the content of state statutes. . . ." In *Hale v. Morgan* (1978) 22 Cal.3d 388, 396, the case upon which amici curiae rely, we acknowledged that the policy of charging citizens with knowledge of the law is based on a fiction because no one, of course, can know all the law. What amici curiae are impliedly asking us to do is stretch the fiction to cover cases where the law is to be found, not in the statute books, nor even at this point in the process in the California Code of Regulations, but rather in "10 newspapers of general circulation in geographically diverse sections of the state." (§ 12276.5, subd. (c).)

Tellingly, not even the Attorney General appears to be prepared to go that far, for he all but concedes that a person who did not have actual notice of a temporary suspension could not constitutionally be convicted of violating section 12280. "It is highly speculative and unlikely that anyone would be prosecuted under the law if they did not have prior notice of the temporary declaration. Furthermore, to the extent that a person could establish a lack of actual or constructive notice of a temporary declaration order and that there was not sufficient information to alert that person of the likelihood that their firearm was subject to regulation, that person would be able to raise an affirmative defense to a possible prosecution for a violation of the temporary declaration. The provisions of section 12276.5 (b), which

require [completion] of the notice requirements before criminal sanctions apply, indicate that the reasonable interpretation of those provisions require[s] a knowing violation of the temporary declaration, as a[n] element of that crime." We cannot agree with the Attorney General. The AWCA seems clearly to contemplate a section 12280 prosecution where the only notice of a temporary declaration would be predicated upon publication of the notice "in not less than 10 newspapers of general circulation in geographically diverse sections of the state." (§ 12276.5, subd. (c).) Such a prosecution would raise grave due process concerns. However, plaintiffs have failed to shoulder their burden of showing the temporary declaration provision of the AWCA to be facially unconstitutional.

The standard governing a facial challenge to the constitutional validity of a statute has been the subject of controversy within this court. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342-343 (plur. opn. of George, C.J. (*American Academy*)); *id.* at p. 412 (dis. opn. of Baxter, J.); *id.* at p. 421 (dis. opn. of Brown, J.); see also *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 347 (*California Teachers*).) We need not revisit that controversy here because plaintiffs have not even made the showing required under the formulations of the standard most favorable to their position, that is, they have failed to demonstrate that the temporary suspension provision of the AWCA would present due process notice issues in the "vast majority of its applications" (*American Academy*, *supra*, 16 Cal.4th at p. 343), or that it would present such problems " 'in the generality of cases' " (*California Teachers*, *supra*, 20 Cal.4th at p. 347). Accordingly, their facial challenge to the constitutionality of the statute must be rejected.

For the same reason, we reject plaintiffs' facial challenge to the statute based on a due process argument focusing on opportunity to be heard. When a hearing is set on permanent declaration that a weapon is an assault weapon, only manufacturers or California distributors of the weapon have a right to intervene. Others, including gun owners, "may, in the court's discretion, thereafter join the action as amicus curiae."

(§ 12276.5, subd. (e).) Plaintiffs complain that gun owners might become criminally liable for failure to register without ever having had an opportunity to contest the addition of their guns to the list of assault weapons. This claim suffers from the same defect as plaintiffs' notice claim. While due process requirements might arguably prevent prosecution in a particular case-where a gun owner sought but was denied amicus curiae status at the section 12276.5, subdivision (e), hearing, or where the Attorney General's petition went unopposed because no one with an incentive to oppose it received actual notice of the hearing-plaintiffs' facial attack is inadequate because they have not demonstrated a deprivation of due process in the "vast majority" (*American Academy, supra*, 16 Cal.4th at p. 343) or " 'generality' " (*California Teachers, supra*, 20 Cal.4th at p. 347) of cases.

II. Disposition

We reverse the judgment of the Court of Appeal.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

CONCURRING OPINION BY MOSK, J.

I concur in the result and much of the reasoning of the majority opinion. I write separately to articulate a somewhat different view of the separation of powers issue.

As the majority correctly recognize, the role that courts play in the add-on procedures of Penal Code section 12276.5 is "essentially adjudicatory." (Maj. opn., *ante*, at p. 20.) Yet the majority's extensive discussion of cases involving the judiciary's performance of *extrajudicial* functions obscures this point. To my mind, the role the court is being asked to

play in section 12276.5 is the traditional one of judicially reviewing whether administrative regulations comply with a statute, and there is therefore no real separation of powers issue.

Typically, quasi-legislative administrative regulations are reviewed via a writ of mandate under Code of Civil Procedure section 1085. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 567.) In this case, the Attorney General is for all intents and purposes promulgating a regulation pursuant to the very specific guidelines of Penal Code section 12276.5. The Legislature could have simply prescribed procedures by which the Attorney General would issue the regulations, and allow the challenge of the regulations through the normal writ of mandate procedures. It chose instead to use an alternate procedure for judicial review, one that occurs before the regulation can take effect. This procedure also places the burden on the government to prove the validity of the regulation rather than, in the usual writ of mandate proceedings, placing the burden on the one challenging the regulation to prove an abuse of discretion. (*Western States Petroleum*, *supra*, 9 Cal.4th at p. 568.) Although this form of judicial review is unconventional, it is not unconstitutional. Indeed, the judicial review prescribed by section 12276.5 is more protective of the individual's right to be free of overreaching government regulations than is conventional judicial review. Therefore, cases cited by plaintiffs regarding the delegation to the judiciary of extrajudicial functions (see, e.g., *Mistretta v. United States* (1989) 488 U.S. 361) are simply inapposite.

For this reason, I agree that Penal Code section 12276.5 does not violate the constitutional separation of powers.

MOSK, J.

I CONCUR:

WERDEGAR, J.

CONCURRING OPINION BY BROWN, J.

I

I concur in the judgment and opinion of the court. I am writing separately because, although the rejection of the equal protection claim is compelled by the majority opinion in *Warden v. State Bar* (1999) 21 Cal.4th 628 (*Warden*), I would independently reach the same conclusion under the unique circumstances of this case.

In *Warden*, a majority of this court abandoned our longstanding commitment to " ' "serious and genuine judicial inquiry" ' " into equal protection claims in favor of the highly deferential rational basis formulation articulated by the United States Supreme Court. (*Warden*, *supra*, 21 Cal.4th 628, 661 (dis. opn. of Brown, J.), quoting *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711, quoting *Dorrough v. Estelle* (5th Cir. 1974) 497 F.2d 1007, 1011.) Under the standard adopted by the *Warden* majority, " '[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.] Where there are "plausible reasons" for [the classification] "our inquiry is at an end." ' (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313, italics added, quoting *U.S. Railroad Retirement Bd. v. Fritz* (1980) 449 U.S. 166, 179; see, e.g., *Central State University v. Amer. Assoc. of University Professors* (1999) 526 U.S. 124; *Werner*

v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 130-132.)" (*Warden*, at p. 644.)

The dichotomy between the United States Supreme Court's laissez-faire treatment of social and economic rights and its hypervigilance with respect to an expanding array of judicially proclaimed fundamental rights is highly suspect, incoherent, and constitutionally invalid. "[T]he outcome in every case turns on how the court chooses to characterize the classification. Suspect classifications, such as those based on race or that impact rights the court deems 'fundamental,' warrant strict (read 'fatal') scrutiny; other classifications warrant rational basis (read 'anything goes') review. (*FCC v. Beach Communications, Inc., supra*, 508 U.S. 307, 313-316.) As Justice Mosk so aptly put it, '[t]he vice of the binary theory . . . is that it applies either a standard that is virtually always met (the rational relationship test) or one that is almost never satisfied (the strict scrutiny test). [Citation.] Once the test is selected, the result of its application is foreordained . . . .' (*Hays v. Wood* (1979) 25 Cal.3d 772, 796 (conc. opn. of Mosk, J.).)" (*Warden, supra*, 21 Cal.4th at pp. 661-662 (dis. opn. of Brown, J.).) Just so, the result here was foreordained once we assumed "the AWCA does not burden a fundamental right under either the federal or state Constitutions, [and therefore,] the rational basis test applies. (See *Peoples Rights Organization, Inc. v. City of Columbus* (6th Cir. 1998) 152 F.3d 522, 531-533; *Coalition of New Jersey Sportsmen, Inc. v. Whitman* (D.N.J. 1999) 44 F.Supp.2d 666, 685; *California Rifle* [*& Pistol Assn., Inc. v. City of West Hollywood* (1998)] 66 Cal.App.4th 1302, 1329; *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1133; *In re Evans* (1996) 49 Cal.App.4th 1263, 1270.)" (Maj. opn., *ante*, at p. 6.)

This case, however, illustrates the illusory nature of the distinction between "fundamental rights" and "areas of social and economic policy." Curiously, in the current dialectic, the right to keep and bear arms - a right expressly guaranteed by the Bill of Rights - is deemed less fundamental than implicit protections the court purports to find in the penumbras of other express provisions. (See, e.g., *Cruzan v. Director, Mo. Dept. of Health* (1990) 497 U.S. 261, 278-279; *Zablocki v.*

Redhail (1978) 434 U.S. 374, 384-387; *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 499-500.) But surely, the right to preserve one's life is at least as fundamental as the right to preserve one's privacy.

The founding generation certainly viewed bearing arms as an individual right based upon both English common law and natural law, a right logically linked to the natural right of self-defense. Blackstone described self-defense as the "primary law of nature," which could not be taken away by the law of society. (2 Jones's Blackstone (1976) p. 4.) "[T]he peaceable part of mankind will be continually overrun by the vile and the abandoned, while they neglect the means of self defense. . . . The supposed quietude of the good man allures the ruffian; . . . (but) arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world. . . . Horrid mischief would ensue were (the good) deprived of the use of [weapons] . . . the weak will become a prey to the strong." (1 Paine, The Writings of Thomas Paine (Conway edit. 1894) p. 56.) Extant political writings of the period repeatedly expressed a dual concern: facilitating the natural right of self-defense and assuring an armed citizenry capable of repelling foreign invaders and quelling tyrannical leaders.

After the Civil War a series of enactments, culminating with the Fourteenth Amendment, acknowledged the correlation between self-defense, citizenship, and freedom. Section 14 of the Freedman's Bureau Act, which the 39th Congress passed over the President's veto, provided: "That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, . . . the right to . . . have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms,* shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery. . . ." (Freedman's Bureau Act (July 16, 1866) 14 Stat. 176, italics added; see Halbrook, *Second Class Citizenship and the Second Amendment in the District of*

Columbia (1995) 5 Geo. Mason U. Civ. Rts. L.J. 105, 141-150 (*Second Class Citizenship*).)

Halbrook concludes the Freedman's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment leave no doubt that " 'the constitutional right to bear arms' is included among the 'laws and proceedings concerning personal liberty, personal security,' and property, and that 'the free enjoyment of such immunities and rights' is to be protected" (*Second Class Citizenship*, *supra*, 5 Geo. Mason U. Civ. Rts. L.J. at p. 150) under the Fourteenth Amendment, which would confer citizenship on all persons born in the United States and imbue them with every right of citizenship, including the right to keep and bear arms. (*Ibid.*) In more recent times, Congress has continued to recognize that the right of law-abiding citizens to keep and bear arms is guaranteed by the Second and the Fourteenth Amendments. (Pub.L. No. 99-308 (May 19, 1986) 100 Stat. 449.)

The judiciary, too, has consistently acknowledged the interplay between express provisions and implicit protections. In *Poe v. Ullman* (1960) 367 U.S. 497, the seminal case in the Supreme Court's fundamental rights jurisprudence, Justice Harlan, dissenting, argued the Fourteenth Amendment due process clause protects privacy. He claimed the due process clause covered, but was not exclusively limited to, "the precise terms of the specific guarantees elsewhere provided in the constitution," including "freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures." (*Id.* at p. 549 (dis. opn. of Harlan, J.).) The court continues to cite Justice Harlan's enumeration as part of the full scope of liberty guaranteed by the Fourteenth Amendment against state infringement. (*Planned Parenthood Southeastern PA v. Casey* (1992) 505 U.S. 833, 848-849; *Roe v. Wade* (1973) 410 U.S. 113, 169 (conc. opn. of Stewart, J.); *Griswold v. Connecticut* (1965) 381 U.S. 479, 499 (conc. opn. of Goldberg, J.).)

II

We got it right two decades ago: "The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a rational relationship between selected legislative ends and the means chosen to further or achieve them." (*Hays v. Wood* (1979) 25 Cal.3d 772, 786.) The reasoning on which we relied has even greater force now. "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (*Id.* at pp. 786-787, quoting *Railway Express v. New York* (1949) 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv. L.Rev. 1, 8.) It is true, of course, that even a searching equal protection analysis will not preclude all underinclusive classifications. Rational basis with bite merely requires that when a legislature addresses an area of concern "in less than comprehensive fashion by 'striking the evil where it is felt most,' [citation] its decision as to where to " 'strike' " must have a rational basis in light of the legislative objectives." (*Hays v. Wood*, *supra*, 25 Cal.3d at p. 791, quoting *Werner v. Southern Cal. etc. Newspapers*, *supra*, 35 Cal.2d at p. 132.) The anomaly here, of course, is that those complaining of unequal treatment - gun owners and dealers - are not a powerless minority, but rather one of the most focused and well-financed interest groups in modern American politics.

Politics is the art of the possible under pressure. "Everything that emerges from the legislative forum is tainted by its journey through the lobby. And the demand for perfection must inevitably compromise with the hard facts of

political life." (Tussman & tenBroek, *The Equal Protection of the Laws* (1949) 37 Cal. L. Rev. 341, 350.) The pledge of equality before the law becomes meaningless if courts routinely validate legislative acquiescence to the strongest pressure group; but democratic processes are undermined if courts exhibit zero tolerance for any deviation from the great principle of equal protection. And the toughest and most delicate of questions is how to apply the principles of equal protection in a case like this one which defies - or perhaps redefines - the paradigm. The answer does not depend on "a mechanical application of convenient formulae," but rather requires a "complex and creative act of judgment." (*Id.* at pp. 350-351.) In this narrow intersection, rational basis analysis and heightened scrutiny may look the same.

Plaintiffs complain that the ban is irrationally underinclusive. Admittedly, the Legislature's findings and declarations seem internally inconsistent. While declaring that it banned the semiautomatic firearms listed in Penal Code section 12276 because each weapon "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings," the Legislature goes on to declare that it does not intend "to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (Pen. Code, § 12275.5.) Conspicuous by its absence is any finding that the listed weapons differ from those not listed with respect to the salient characteristic, namely, their "rate of fire and capacity for firepower." (*Ibid.*)

On the other hand, plaintiff's claim that the ban is irrational because it will have no effect on violent crime proves too much. The insistence upon a rational relationship between selected legislative ends and the means chosen to further them cannot be so exacting. To declare murder a crime will not prevent murder. Prohibiting the possession of weapons by convicted felons will not stop criminals from obtaining guns. Assessing ever greater penalties has not eliminated the scourge of drug abuse. Means scrutiny

assumes the law will have some effect and compares that effect with the means the Legislature has chosen.

Were courts to overturn every legislative action that is likely to be ineffective, few laws would survive. As in other spheres of human endeavor, legislative action is often fated to be more symbolic than real, and the understandable human desire to *do* something to address the crisis of the moment, not to mention the political necessity of being *seen* to be doing something, may be the real object of many legislative exercises. (See Kobayashi & Olson, *In re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons"* (1997) 8 Stan. L. & Pol'y Rev. 41, 43.) And, to be fair, the most severe problems confronting us - like the current plague of violence - are quite beyond the capacity of government to cure. As Solzhenitsyn observed half a century ago, "the line separating good and evil passes not through states, nor between classes, nor between political parties either - but right through every human heart - and through all human hearts." (Solzhenitsyn, The Gulag Archipelago (1992) p. 615.)

Constitutional provisions divide into two categories: the "historically defined hard core of procedural provisions," including the Bill of Rights, the mechanics of institutional arrangements, political processes, and power allocations (Bickel, The Morality of Consent (1975) p. 29) and the "constitutional generalities" which must make it possible for future battles to be fought and for the Constitution "to transcend and endure beyond the fiercest political differences." (Bickel, The Least Dangerous Branch (1962) p. 105.) While the courts must enforce both, the necessary openendedness of concepts like equal protection means judicial review has important practical limits in a democracy. Where legislative compromise is still possible under conditions which are likely to fairly reconcile competing interests, courts may decline to intervene. The court's duty to restrain the tyranny of the majority must be measured against its obligation to act prudentially and with deference to the political process. Under our regime, a court must oppose arbitrary injustice even when acts of oppression have been

duly enacted, and may vouchsafe no answer though contending political forces - momentarily in equipoise - teeter on the edge of tyranny.

Here, the underinclusiveness of the statute is not an attempt to exploit a despised minority. Instead, the Legislature sought to satisfy its need to do something about gun violence without awakening the political enmity of a large and effective constituency. Gun owners may be, as amici curiae argue, "a class of people subjected . . . to vicious stereotypes," but in the political realm a vicious stereotype is a constitutional disadvantage only when it results in impotence.

III

The issue before us may be among the most troubling and intractable of the last 30 years. Predictably, as cultural disintegration accelerates, the level of lethal violence escalates. Even cynics, quick to accuse elected officials of political posturing and empty symbolism, are stunned by the steadily mounting body count. Like the poet, we are forced to "put [our] eyes on a diet" because our "tears are gaining too much weight." (Kaufman, Golden Sardine (1967) "Heavy Water Blues," p. 60.) It is impossible not to grieve for the thousands of young men cut down in their prime; impossible not to mourn toddlers slaughtered in the midst of innocent play; impossible to ignore the grim reality of school children whose final moments echo with screams of terror and the sudden slap of bullets. And worse even than the slaughter of innocents is the death of innocence. All too often, the killers are children, too.

Some antigun advocates candidly admit they welcome " '[shooting] incidents' " and hope " 'more heinous ones with more tragic or important victims' " will help move public opinion beyond support for narrow controls to the desired goal of complete disarmament. (Kates, *Gun Control: Separating Reality From Symbolism* (1994) 20 J. Contemp. L. 353, 358, quoting Ross, *Book Review* (1992) 98 Am. J. Soc. 661.) Amitai Etzioni, as spokesman for the Communitarian Network, dismisses the gun control measures that have been enacted and those currently under discussion as but " 'vanilla-

pale' " measures. (Kopel et al., *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibitions* (1997) 56 Md. L. Rev. 438, 450, quoting Etzioni et al., *The Case for Domestic Disarmament* (1992) The Communitarian Network <http://www.gwu.edu/~ccps/pop_disarm.html (June 5, 2000).) In Professor Etzioni's view, the only effecttive measure to end gun violence is domestic disarmament. (*Ibid.*) He has elsewhere argued that the right of the people to keep and bear arms (if any such right exists) is outweighed by the right of the public to be safe. (Kopel et al., at p. 445, quoting The Communitarian Network, *The Responsive Communitarian Platform: Rights and Responsibilities* reprinted in Rights and the Common Good: The Communitarian Perspective (Etzioni edit. 1995) 11, 19.)

I suspect the freedmen of the Reconstruction Era would vehemently disagree. So would the Armenians facing the Ottoman Turks in 1915, the embattled Jews of the Warsaw Ghetto in 1943, and the victims of Pol Pot's killing fields.

The media keep the horrific visions of gun violence ever before our eyes. These acts of individual madness are undeniably tragic and totally unacceptable in a civilized society. But there are other horrific visions - the victims of which number in the millions - perpetrated by governments against unarmed populations.

Conclusion

The framers could have had no conception of the massive scale on which government-sanctioned murder would be committed in the twentieth century, but they had a keen appreciation of the peril of being defenseless. That wariness is reflected in the Constitution. Perhaps they would agree with Thomas Paine's practical observation in his article *Thoughts on Defensive War* (Paine, *Thoughts on Defensive War* (July 1775) Pennsylvania Magazine <http://www.scican.net/~jsnider/thotsdefwar.html> (as of June 13, 2000)): "I am thus far a Quaker, that I would gladly agree with all the world to lay aside the use of arms, and settle matters by negotiation: but unless the whole will, the matter ends, and I take up my musket and thank heaven . . . ."

BROWN, J.

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

The Roberti-Roos Assault Weapons Control Act of 1989 (Pen. Code, § 12275 et seq.; hereafter the Act) bans certain semiautomatic firearms as "assault weapons," listing them by make and model. Plaintiffs' complaint alleged that many other guns not banned by the Act are identical to or functionally indistinguishable from those that are banned. According to plaintiffs, the Act draws no rational distinction between the guns that are prohibited and those that are not, thus violating state and federal constitutional guarantees of equal protection of the laws.

Unlike the majority, I agree with the Court of Appeal that plaintiffs' complaint has adequately alleged an equal protection violation and that therefore plaintiffs are entitled to present evidence in support of their allegations.

Although I disagree with the majority's rejection of plaintiffs' equal protection claim, I join fully in parts I.B. and I.C. of the majority opinion, rejecting plaintiffs' separation of powers and due process claims.

I

On January 17, 1989, a mentally disturbed man armed with a semiautomatic rifle fired 105 rounds at a Stockton schoolyard, killing five children and wounding many others. This tragedy prompted the Legislature's passage of the Act some six months later.

In section 12275.5, the Act sets out the Legislature's intent for its ban on assault weapons: "The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm

is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent . . . to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities."

The Act defines as "assault weapons" certain semiautomatic rifles, pistols, and shotguns, listing them by manufacturer and model. (§ 12276.) It also contains a judicial "add-on" procedure allowing the Attorney General to petition a court to add certain other makes and models of firearms to the assault weapons list. (§ 12276.5, subd. (a)(1) and (2).)

For guns classified as assault weapons, the Act makes their manufacture, distribution, import into the state, sale, or loan a felony punishable by up to eight years in state prison. (§ 12280, subd. (a)(1).) The Act also prohibits possession of such guns, an offense punishable by up to one year of imprisonment. (§ 12280, subd. (b).) But the Act has a "grandfather" provision allowing persons who owned assault weapons before June 1, 1989, or before they were judicially added to the list of assault weapons, to register them with the Department of Justice and then to have limited use of those guns. (§ 12285, subds. (a), (b)(1) and (c).)

II

In April 1991, plaintiffs filed this action challenging the constitutionality of the Act on various grounds. The first amended complaint asserted that section 12276.5's judicial add-on procedure, which allows the Attorney General to petition a court to add certain other firearms to the assault weapons list, impermissibly assigned legislative functions to the judicial branch in violation of California Constitution, article VI, section 1. The complaint also alleged that the Act failed to provide fair warning to owners of the judicially added-on guns, thus violating principles of due process under the federal and state Constitutions (U.S. Const., 14th Amend.,

§ 1; Cal. Const., art. I, § 29). As I noted at the outset, I agree with the majority that as to either allegation plaintiffs have failed to adequately state a cause of action.

Plaintiffs' complaint also alleged violations of the equal protection guarantees of the federal and state Constitutions, contending the Act was constitutionally underinclusive because there was no rational basis for regulating the listed firearms but not regulating other identical or functionally indistinguishable guns.

The Attorney General demurred to plaintiffs' first amended complaint. The trial court sustained the demurrer and dismissed the case. The Court of Appeal reversed. This court granted the Attorney General's petition for review, which raised, among others, this issue: Does a penal statute listing firearms by model, type, and series, and prohibiting their possession, sale, and use, violate principles of equal protection by failing to include on the list other functionally indistinguishable firearms? The answer is "yes," as I explain below.

III

A

The federal Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) This provision does not create substantive rights. (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 33.) "Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." (*Vacco v. Quill* (1997) 521 U.S. 793, 799.)

Like the federal Constitution, the California Constitution provides that "[a] person may not be . . . denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).)

As I stated recently in my dissenting opinion in *Warden v. State Bar* (1999) 21 Cal.4th 628, 652: "The United States Supreme Court and this court have enunciated three standards of review for deciding constitutional equal protection

challenges. (See generally Tribe, American Constitutional Law (2d ed. 1988) §§ 16-32, p. 1601 et seq.) For legislation containing a 'suspect' classification, such as race, or touching upon a fundamental interest, such as voting, courts have been directed to apply strict scrutiny and to uphold the legislation only if its classification is precisely tailored to further a compelling governmental interest. [Citations.] For legislation discriminating on the basis of gender or illegitimacy, courts are to apply intermediate scrutiny and to uphold the legislation only if its classification serves an important governmental objective and is substantially related to achievement of that objective. [Citations.] Finally, when the conditions requiring either strict or intermediate scrutiny are absent, courts are to apply what is commonly called the 'rational basis' standard of review, under which challenged legislation is upheld if its classification is rationally related to a legitimate governmental purpose. [Citations.]"

Here, plaintiffs assert that the Act, when evaluated under the deferential rational basis test, violates the constitutional guarantee of equal protection of the laws. Because I conclude that plaintiffs have adequately pled an equal protection cause of action under that standard, I do not address the applicability of any stricter test.

Although the majority and I both apply the rational basis test to this case, we reach different conclusions. I do, however, agree with the majority's general observation that the right to equal protection granted to "persons" by the federal and state Constitutions extends not just to persons but to persons' interests in things, such as plaintiffs' interests in particular firearms covered by the Act. (Maj. opn., *ante*, at p. 4, in this regard disagreeing with *Benjamin v. Bailey* (Conn. 1995) 662 A.2d 1226, 1235-1237; and disapproving *California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1326.)

B

The United States Supreme Court has itself acknowledged that its cases applying the rational basis standard have described that standard in differing, and oftentimes

conflicting, ways. (See *U.S. Railroad Retirement Bd. v. Fritz* (1980) 449 U.S. 166, 176-177, fn. 10 ["The most arrogant legal scholar would not claim that all of [this court's rational basis] cases applied a uniform or consistent test under equal protection principles"].) But in its most recent pronouncements on the rational basis test, the high court has said this: "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313; accord, *Central State Univ. v. Amer. Assoc. of Univ. Professors* (1999) 526 U.S.124, 127-128 (*Central State Univ.*) [" 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose' "].)

The United States Supreme Court does not "require a legislature to articulate its reasons for enacting a statute, [and considers it] entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (*FCC v. Beach Communications, Inc., supra*, 508 U.S. at p. 315; *Nordlinger v. Hahn* (1992) 505 U.S. 1, 15 [equal protection "does not demand for purposes of rational-basis review that a legislature . . . actually articulate . . . the purpose or rationale supporting its classification"]; see also *Central State Univ., supra*, 526 U.S. at p. 129 (conc. opn. of Ginsburg, J.) ["for the mine run of economic regulations that do not trigger heightened scrutiny . . . 'the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification' "].) And the high court has said that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' " (*FCC v. Beach Communications, Inc., supra*, 508 U.S. at p. 315.)

Although perhaps difficult to do, refuting every conceivable basis that might support the rationality of a legislative

classification is not impossible. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." (*Romer v. Evans* (1996) 517 U.S. 620, 632.) That clause "does not forbid classifications," but it does forbid "governmental decisionmakers from treating differently persons who are in all relevant respects alike." (*Nordlinger v. Hahn*, *supra*, 505 U.S. at p. 10.) Thus, a statute may violate equal protection if it is underinclusive (benefiting or burdening only some members of a group of similarly situated individuals), and if there is no rational basis for its discriminatory treatment of different members of the group.

Here, the Act treats manufacturers and owners of semi-automatic firearms classified by make and model in section 12276's list of assault weapons differently from those who manufacture and own other semiautomatic firearms. Manufacturers of firearms included in the list of assault weapons cannot make or sell those guns in California. (§ 12280, subd. (a)(1).) And owners of such firearms must register them with the Department of Justice to have even limited use of their guns. (§ 12285, subds. (a) and (c).) Noncompliance with these restrictions is punishable as a felony. (§ 12280, subds. (a)(1) and (b).) But for all other semiautomatic firearms, the Act imposes no registration requirement or limitation on their manufacture, transfer, or use.

Plaintiffs' complaint alleged that the Act is unconstitutionally underinclusive because the regulated firearms are identical or functionally indistinguishable from unregulated firearms. According to the complaint, firearms covered by the Act pose no greater risk to the public than any other semiautomatic firearms, and Federal Bureau of Investigation statistics show that, in comparison to all other firearms, the guns classified in the Act's list of assault weapons are rarely used in crime. The complaint further alleged that some of the guns not covered by the Act are

actually more deadly than those classified as assault weapons, because the latter generally are designed for "down-powered military ammunition" intended to maximize wounding, not killing, in deference to the laws of war, while the former include hunting rifles, intended for killing. Plaintiffs assert that other omitted semiautomatic firearms are identical in weight or lighter than regulated guns, and shoot "similar or identical military-caliber ammunition at the same rate of fire, from magazines holding an equal number of rounds."

Because the trial court here dismissed plaintiffs' complaint without giving them the opportunity to present evidence, those allegations must be "deemed true for the limited purpose of determining whether the plaintiff[s] [have] stated a viable cause of action." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672].) Therefore, I assume the truth of plaintiffs' allegations that the semiautomatic firearms specified in the Act as assault weapons are not in any material respect different from other semiautomatic firearms that, although identical to or functionally indistinguishable from the banned guns, are not subject to the Act.

As I have explained, the constitutional principle of equal protection prohibits a law from "treating differently persons who are in all relevant respects alike." (*Nordlinger v. Hahn*, *supra*, 505 U.S. at p. 10; see also *Peoples Rights Organization, Inc. v. City of Columbus* (6th Cir. 1998) 152 F.3d 522, 532-533 [invalidating on this ground the registration provision of an assault weapon law treating differently owners of functionally indistinguishable guns].) If in this case the factual allegations pleaded in plaintiffs' complaint are true, the Act violates the constitutional guarantee of equal protection of the laws by irrationally banning some but not all similar firearms. In my view, plaintiffs have adequately pleaded a cause of action alleging the Act's equal protection violation.

In rejecting plaintiffs' equal protection claim, the majority states that the Legislature could properly address the prohibition and regulation of semiautomatic firearms one step

at a time, banning some now and leaving until later the decision to ban others. (Maj. opn., *ante*, at pp. 15-16.) The majority wholly misapplies the rule it invokes, however. It fails to recognize that legislation does not automatically satisfy the constitutional guarantee of equal protection of the laws simply by addressing only part of a problem. Contrary to the majority, it is not enough that the Legislature here thought that banning some -- but not all -- similar guns "would make California a safer place, even if only marginally and incrementally." (*Id.* at p. 19.) Rather, the Legislature must have some rational basis for drawing the lines that it does; it may not arbitrarily choose whom to regulate and whom to leave untouched. Not only must the legislative objective (here, a reduction in gun violence) be rational, but the classifications drawn to advance that objective (here, the division between the weapons prohibited by the Act and those it permits) must also be rational.

"[W]hen the legislative body proposes to address an area of concern in less than comprehensive fashion by 'striking the evil where it is felt most' [citation], its decision as to where to 'strike' must have a rational basis in light of the legislative objectives. The same principle was expressed by the United States Supreme Court in *Rinaldi v. Yeager* (1966) 384 U.S. 305, when it stated, at pages 308-309: 'The Equal Protection Clause requires more of a state law than nondiscriminatory application within a class it establishes. [Citation.] It also imposes a requirement of some rationality in the nature of the class singled out. . . . [T]he Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." [Citations.]' " (*Hays v. Woods* (1979) 25 Cal.3d 772, 791.)

The United States Supreme Court applied the requirement that any step-by-step approach have a rational basis for the disparities it creates in *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 466. There, Minnesota banned plastic disposable milk containers while permitting paper ones. Relying on a full record created by "extensive evidentiary hearings" (*id.* at p. 460), the high court explained

that the distinction was justified by evidence of differences in the environmental consequences of the two different types of containers. It was only because of these differences between the two types of containers, demonstrated in the evidentiary hearings, that the court concluded that "[t]he Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems [plastic], merely because another type [paper], already established in the market, is permitted to continue in use." (*Id.* at p. 466.)

Here, plaintiffs' complaint alleged that the Act discriminates between owners and makers of different models of functionally indistinguishable guns, with members of one group facing severe criminal penalties for conduct that remains completely legal for similarly situated members of the other group. The majority cites no United States Supreme Court authority upholding any similar legislative scheme, much less authority for doing so at the pleading stage without conducting any evidentiary proceedings to resolve the merits of the issue. Just this year the high court reiterated that a complaint alleging, as does plaintiffs' complaint here, that the government has treated similarly situated persons differently and that its differential treatment is irrational and arbitrary is "sufficient to state a claim for relief under traditional equal protection analysis." (*Village of Willowbrook v. Olech* (2000) ____ U.S. ____ [120 S.Ct. 1073, 1075].)

In concluding that the trial court erred in dismissing plaintiffs' equal protection cause of action, I express no view on plaintiffs' likelihood of success in proving the similarities between the regulated and unregulated semiautomatic firearms. At this juncture, I conclude only that plaintiffs have alleged sufficient facts at the pleading stage permitting them to go forward on their equal protection claim.

CONCLUSION

Because of all-too-frequent tragic instances of gun violence, such as the Stockton schoolyard massacre that prompted the Legislature's 1989 enactment of the Roberti-Roos Assault Weapons Control Act at issue here, many in our

society see the need for strict gun control. Others oppose all firearm regulation, believing that it threatens what the United States Supreme Court has called the "long tradition of widespread lawful gun ownership by private individuals in this country." (*United States v. Staples* (1994) 511 U.S. 600, 610.) That public debate on gun policy is not before us here.

Californians who are divided on the need for strict gun control are generally united in supporting the constitutional principle of equal protection-that the government should treat similar cases alike, free of arbitrary or invidious distinctions. Here, plaintiffs have alleged that the Act, which bans some semiautomatic weapons but not others, lacks any rational basis for its choice of the guns that are subject to its requirements. At this early stage of the litigation, those allegations are sufficient, and plaintiffs should now be given the opportunity to prove, if they can, what they have so far only alleged. Unlike the majority, I would grant them this opportunity.

KENNARD, J.

APPENDIX

§ 12275. Short title

This chapter shall be known as the Roberti-Roos Assault Weapons Control Act of 1989.

(Added by Stats.1989, c. 19, § 3.)

§ 12275.5. Legislative findings and declarations

The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure

human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.

(Added by Stats.1989, c. 19, § 3.)

§ 12276. Assault weapon

As used in this chapter, "assault weapon" shall mean the following designated semiautomatic firearms:

(a) All of the following specified rifles:

(1) All AK series including, but not limited to, the models identified as follows:

(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.

(B) Norinco 56, 56S, 84S, and 86S.

(C) Poly Technologies AKS and AK47.

(D) MAADI AK47 and ARM.

(2) UZI and Galil.

(3) Beretta AR-70.

(4) CETME Sporter.

(5) Colt AR-15 series.

(6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.

(7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.

(8) MAS 223.

(9) HK-91, HK-93, HK-94, and HK-PSG-1.

(10) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M11.

(11) SKS with detachable magazine.

(12) SIG AMT, PE-57, SG 550, and SG 551.

(13) Springfield Armory BM59 and SAR-48.

(14) Sterling MK-6.

(15) Steyer AUG.

(16) Valmet M62S, M71S, and M78S.

(17) Armalite AR-180.

(18) Bushmaster Assault Rifle.

(19) Calico M-900.

(20) J&R ENG M-68.

(21) Weaver Arms Nighthawk.

(b) All of the following specified pistols:

(1) UZI.

(2) Encom MP-9 and MP-45.

(3) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M-11.

(C) Advance Armament Inc. M-11.

(D) Military Armament Corp. Ingram M-11.

(4) Intratec TEC-9.

(5) Sites Spectre.

(6) Sterling MK-7.

(7) Calico M-950.

(8) Bushmaster Pistol.

(c) All of the following specified shotguns:

(1) Franchi SPAS 12 and LAW 12.

(2) Striker 12.

(3) The Streetsweeper type S/S Inc. SS/12.

(d) Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

(e) The term "series" includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons.

(Added by Stats.1989, c. 19, § 3. Amended by Stats.1991, c. 954 (S.B.263), § 2.)

(Amended by Stats.1992, c. 427 (A.B.3355), § 134; Stats.1993, c. 606 (A.B.166), § 19 eff. Oct. 1, 1993.)

§ 12276.1. Assault weapon; further definition

(a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:

(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:

(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

(B) A thumbhole stock.

(C) A folding or telescoping stock.

(D) A grenade launcher or flare launcher.

(E) A flash suppressor.

(F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

(B) A second handgrip.

(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

(6) A semiautomatic shotgun that has both of the following:

(A) A folding or telescoping stock.

(B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

(8) Any shotgun with a revolving cylinder.

(b) "Assault weapon" does not include any antique firearm.

(c) The following definitions shall apply under this section:

(1) "Magazine" shall mean any ammunition feeding device.

(2) "Capacity to accept more than 10 rounds" shall mean capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(3) "Antique firearm" means any firearm manufactured prior to January 1, 1899.

(d) This section shall become operative January 1, 2000.

(Added by Stats.1999, c. 129 (S.B.23), § 7, operative Jan. 1, 2000.)

§ 12276.5. Temporary suspension of manufacture, sale, distribution, transportation, importation, or lending of alleged assault weapon; distribution of description

(a) Upon request by the Attorney General filed in a verified petition in a superior court of a county with a population of more than 1,000,000, the superior court shall issue a declaration of temporary suspension of the manufacture, sale, distribution, transportation, or importation into the state, or the giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276 because the firearm is either of the following:

(1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in subdivision (a), (b), or (c) of Section 12276 which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount. The court shall strictly construe this

paragraph so that a firearm which is merely similar in appearance but not a prototype or copy cannot be found to be within the meaning of this paragraph.

(2) A firearm first manufactured or sold to the general public in California after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, regardless of the company of production or distribution, or the country of origin.

(b) Upon the issuance of a declaration of temporary suspension by the superior court and after the Attorney General has completed the notice requirements of subdivisions (c) and (d), the provisions of subdivision (a) of Section 12280 shall apply with respect to those weapons.

(c) Upon declaration of temporary suspension, the Attorney General shall immediately notify all police, sheriffs, district attorneys, and those requesting notice pursuant to subdivision (d), shall notify industry and association publications for those who manufacture, sell, or use firearms, and shall publish notice in not less than 10 newspapers of general circulation in geographically diverse sections of the state of the fact that the declaration has been issued.

(d) The Attorney General shall maintain a list of any persons who request to receive notice of any declaration of temporary suspension and shall furnish notice under subdivision (c) to all these persons immediately upon a superior court declaration. Notice shall also be furnished by the Attorney General by certified mail, return receipt requested (or substantial equivalent if the person who is to receive the notice resides outside the United States), to any known manufacturer and California distributor of the weapon which is the subject of the temporary suspension order or their California statutory agent for service. The notice shall be deemed effective upon mailing.

(e) After issuing a declaration of temporary suspension under this section, the superior court shall set a date for hearing on a permanent declaration that the weapon is an assault weapon. The hearing shall be set no later than 30 days from the date of issuance of the declaration of temporary suspension. The hearing may be continued for good cause thereafter. Any manufacturer or California distributor of the weapon which is the subject of the temporary suspension order has the right, within 20 days of notification of the issuance of the order, to intervene in the action. Any manufacturer or California distributor who fails to timely exercise its right of intervention, or any other person who manufactures, sells, or owns the assault weapon may, in the court's discretion, thereafter join the action as amicus curiae.

(f) At the hearing, the burden of proof is upon the Attorney General to show by a preponderance of evidence that the weapon which is the subject of the declaration of temporary suspension is an assault weapon. If the court finds the weapon to be an assault weapon, it shall issue a declaration that it is an assault weapon under Section 12276. Any party to the matter may appeal the court's decision. A declaration that the weapon is an assault weapon shall remain in effect during the pendency of the appeal unless ordered otherwise by the appellate court.

(g) The Attorney General shall prepare a description for identification purposes, including a picture or diagram, of each assault weapon listed in Section 12276, and any firearm declared to be an assault weapon pursuant to this section, and shall distribute the description to all law enforcement agencies responsible for enforcement of this chapter. Those law enforcement agencies shall make the description available to all agency personnel.

(h) The Attorney General shall promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations. Any declaration that a specified firearm is an

assault weapon shall be implemented by the Attorney General who, within 90 days, shall promulgate an amended list which shall include the specified firearm declared to be an assault weapon. The Attorney General shall file the amended list with the Secretary of State for publication in the California Code of Regulations.

Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code, pertaining to the adoption of rules and regulations, shall not apply to any list of assault weapons promulgated pursuant to this section.

(i) The Attorney General shall adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of this chapter.

(Added by Stats.1989, c. 19, § 3. Amended by Stats.1990, c. 874 (S.B.2444), § 1; Stats.1991, c. 954 (S.B.263), § 3.)

§ 12277. Person

As used in this chapter, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created.

(Added by Stats.1989, c. 19, § 3.)

(Amended by Stats.1994, c. 1010 (S.B.2053), § 201.)

§ 12280. Manufacture, distribution, transportation, importation, sale, possession, or lending of assault weapon; punishment; commission of other crime; exceptions

(a)(1) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for four, six, or eight years.

(2) In addition and consecutive to the punishment imposed under paragraph (1), any person who transfers, lends, sells, or gives any assault weapon to a minor in violation of paragraph (1) shall receive an enhancement of one year.

(b) Except as provided in Section 12288, and in subdivisions (c) and (d), any person who, within this state, possesses any assault weapon, except as provided in this chapter, is guilty of a public offense and upon conviction shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year. However, if the person presents proof that he or she lawfully possessed the assault weapon prior to June 1, 1989, or prior to the date it was specified as an assault weapon, and has since either registered the firearm and any other lawfully obtained firearm specified by Section 12276 or 12276.5 pursuant to Section 12285 or relinquished them pursuant to Section 12288, a first-time violation of this subdivision shall be an infraction punishable by a fine of up to five hundred dollars ($500), but not less than three hundred fifty dollars ($350), if the person has otherwise possessed the firearm in compliance with subdivision (c) of Section 12285. In these cases, the firearm shall be returned unless the court finds in the interest of public safety, after notice and hearing, that the assault weapon should be destroyed pursuant to Section 12028.

(c) A first-time violation of subdivision (b) shall be an infraction punishable by a fine of up to five hundred dollars ($500), if the person was found in possession of no more than two firearms in compliance with subdivision (c) of Section 12285 and the person meets all of the following conditions:

(1) The person proves that he or she lawfully possessed the assault weapon prior to the date it was defined as an assault weapon pursuant to Section 12276.1.

(2) The person is not found in possession of a firearm specified as an assault weapon pursuant to Section 12276 or Section 12276.5.

(3) The person has not previously been convicted of violating this section.

(4) The person was found to be in possession of the assault weapons within one year following the end of the one-year registration period established pursuant to subdivision (a) of Section 12285.

(5) The person has since registered the firearms and any other lawfully obtained firearms defined by Section 12276.1, pursuant to Section 12285, except as provided for by this section, or relinquished them pursuant to Section 12288.

(d) Firearms seized pursuant to subdivision (c) shall be returned unless the court finds in the interest of public safety, after notice and hearing, that the assault weapon should be destroyed pursuant to Section 12028.

(e) Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section may receive an additional, consecutive punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime.

(f) Subdivisions (a) and (b) shall not apply to the sale to, purchase by, or possession of assault weapons by the Department of Justice, police departments, sheriffs' offices, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Game, Department of Parks and Recreation, or the military or naval forces of this state or of the United States for use in the discharge of their official duties.

(g) Subdivision (b) shall not prohibit the possession or use of assault weapons by sworn peace officer members of those agencies specified in subdivision (f) for law enforcement purposes, whether on or off duty.

(h) Subdivisions (a) and (b) shall not prohibit the sale or transfer of assault weapons by an entity specified in subdivision (f) to a person, upon retirement, who retired as a sworn officer from that entity.

(i) Subdivision (b) shall not apply to the possession of an assault weapon by a retired peace officer who received that assault weapon pursuant to subdivision (h).

(j) Subdivision (b) shall not apply to the possession of an assault weapon, as defined in Section 12276, by any person during the 1990 calendar year, during the 90-day period immediately after the date it was specified as an assault weapon pursuant to Section 12276.5, or during the one-year period after the date it was defined as an assault weapon pursuant to Section 12276.1, if all of the following are applicable:

(1) The person is eligible under this chapter to register the particular assault weapon.

(2) The person lawfully possessed the particular assault weapon described in paragraph (1) prior to June 1, 1989, if the weapon is specified as an assault weapon pursuant to Section 12276, or prior to the date it was specified as an assault weapon pursuant to Section 12276.5, or prior to the date it was defined as an assault weapon pursuant to Section 12276.1.

(3) The person is otherwise in compliance with this chapter.

(k) Subdivisions (a) and (b) shall not apply to the manufacture by persons who are issued permits pursuant to Section 12287 of assault weapons for sale to the following:

(1) Exempt entities listed in subdivision (f).

(2) Entities and persons who have been issued permits pursuant to Section 12286.

(3) Entities outside the state who have, in effect, a federal firearms dealer's license solely for the purpose of distribution to an entity listed in paragraphs (4) to (6), inclusive.

(4) Federal military and law enforcement agencies.

(5) Law enforcement and military agencies of other states.

(6) Foreign governments and agencies approved by the United States State Department.

(l) Subdivision (a) shall not apply to a person who is the executor or administrator of an estate that includes an assault weapon registered under Section 12285 or that was possessed pursuant to subdivision (g) or (i) which is disposed of as authorized by the probate court, if the disposition is otherwise permitted by this chapter.

(m) Subdivision (b) shall not apply to a person who is the executor or administrator of an estate that includes an assault weapon registered under Section 12285 or that was possessed pursuant to subdivision (g) or (i), if the assault weapon is possessed at a place set forth in paragraph (1) of subdivision (c) of Section 12285 or as authorized by the probate court.

(n) Subdivision (a) shall not apply to:

(1) A person who lawfully possesses and has registered an assault weapon pursuant to this chapter who lends that assault weapon to another if all the following apply:

(A) The person to whom the assault weapon is lent is 18 years of age or over and is not in a class of persons prohibited from possessing firearms by virtue of Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

(B) The person to whom the assault weapon is lent remains in the presence of the registered possessor of the assault weapon.

(C) The assault weapon is possessed at any of the following locations:

(i) While on a target range that holds a regulatory or business license for the purpose of practicing shooting at that target range.

(ii) While on the premises of a target range of a public or private club or organization organized for the purpose of practicing shooting at targets.

(iii) While attending any exhibition, display, or educational project that is about firearms and that is sponsored by, conducted under the auspices of, or approved by a law enforcement agency or a nationally or state recognized entity

that fosters proficiency in, or promotes education about, firearms.

(2) The return of an assault weapon to the registered possessor which is lent by the same pursuant to paragraph (1).

(o) Subdivision (b) shall not apply to the possession of an assault weapon by a person to whom an assault weapon is lent pursuant to subdivision (n).

(p) Subdivisions (a) and (b) shall not apply to the possession and importation of an assault weapon into this state by a nonresident if all of the following conditions are met:

(1) The person is attending or going directly to or coming directly from an organized competitive match or league competition that involves the use of an assault weapon.

(2) The competition or match is conducted on the premises of one of the following:

(i) A target range that holds a regulatory or business license for the purpose of practicing shooting at that target range.

(ii) A target range of a public or private club or organization that is organized for the purpose of practicing shooting at targets.

(3) The match or competition is sponsored by, conducted under the auspices of, or approved by, a law enforcement agency or a nationally or state recognized entity that fosters proficiency in, or promotes education about, firearms.

(4) The assault weapon is transported in accordance with Section 12026.1 or 12026.2.

(5) The person is 18 years of age or over and is not in a class of persons prohibited from possessing firearms by virtue of Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

(q) Subdivision (b) shall not apply to any of the following persons:

(1) A person acting in accordance with Section 12286.

(2) A person who has a permit to possess an assault weapon issued pursuant to Section 12286 when he or she is acting in accordance with Section 12285 or 12286.

(r) Subdivisions (a) and (b) shall not apply to any of the following persons:

(1) A person acting in accordance with Section 12285.

(2) A person acting in accordance with Section 12286 or 12290.

(s) Subdivision (b) shall not apply to the registered owner of an assault weapon possessing that firearm in accordance with subdivision (c) of Section 12285.

(t) Subdivision (a) shall not apply to the importation into this state of an assault weapon by the registered owner of that assault weapon, if it is in accordance with the provisions of subdivision (c) of Section 12285.

(u) As used in this chapter, the date a firearm is an assault weapon is the earliest of the following:

(1) The effective date of an amendment to Section 12276 that adds the designation of the specified firearm.

(2) The effective date of the list promulgated pursuant to Section 12276.5 that adds or changes the designation of the specified firearm.

(3) The operative date of Section 12276.1, as specified in subdivision (b) of that section.

(Added by Stats.1989, c. 19, § 3. Amended by Stats.1989, c. 959, § 1; Stats.1990, c. 177 (S.B.830), § 5, eff. June 27, 1990; Stats.1990, c. 653 (S.B.2480), § 2; Stats.1991, c. 952 (A.B.1904), § 4; Stats.1991, c. 954 (S.B.263), § 4.5.)

(Amended by Stats.1992, c. 1326 (A.B.3552), § 13; Gov.Reorg.Plan No. 1 of 1995, § 51, eff. July 12, 1995; Stats.1996, c. 305 (A.B.3103), § 52; Stats.1999, c. 129 (S.B.23), § 8.)

Court of Appeal, Third Appellate District - No. C017769
S069522

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PETER ALAN KASLER, et al.,
Appellants,

v.

BILL LOCKYER, as Attorney General, etc., et al.,
Respondents.

Petition for rehearing DENIED.

Kennard, J., is of the opinion the petition should be granted.

George
Chief Justice

Entered August 16, 2000.

Court of Appeal, Third District, California.

Peter Alan KASLER et al.,
Plaintiffs and Appellants,
v.
Daniel L. LUNGREN, as Attorney General, etc., et al.
Defendants and Respondents.

No. C017769.

March 4, 1998.
Review Granted May 20, 1998.

MORRISON, Associate Justice.

This appeal challenges the Roberti-Roos Assault Weapons Control Act of 1989 (the Act) (Pen.Code, § 12275 et seq., further unspecified section references are to this Code). The trial court sustained a demurrer without leave to amend except as to one cause of action, regarding a particular model of rifle (the Colt Sporter), which plaintiffs (Kasler) declined to amend. We reverse with directions.

This appeal is not about the competing, earnest, views of those who wish to ban guns and those who wish to own and lawfully use them. The parties "have submitted materials concerning the desirability of weapons control, and the effect of weapons control on crime rates. It is well established that the wisdom of legislation is beyond the competence of the court [citation]; that for a court to invalidate legislation based on the usefulness or desirability of the law, the law must be not only unwise but unrelated to any legitimate governmental purpose [citation]. The arguments made in this connection, although of possible interest to the Legislature, are without merit in this court." (Galvan v. Superior Court of City and County of San Francisco (1969) 70 Cal.2d 851, 869, 76 Cal.Rptr. 642, 452 P.2d 930.) It is not within our province as judges to determine whether regulating guns in general, or some or all semiautomatic guns in particular, will be "good" or "bad" for California. That is a determination about social

policy which the People must make, directly by initiative or through their elected representatives. Our function is to determine whether the complaint competently alleges constitutional flaws in the method chosen by the Legislature to regulate certain guns. We conclude that it does.

The Act consists of a list by make and model of banned guns and a mechanism by which the judiciary is allowed to add guns to the list. This mechanism (the "add-on" provision) violates the separation of powers doctrine and the due process of law. Although this provision seems central to the purpose of the Act, and it seems unlikely that the remainder of the Act would have been passed without it, the Act contains a severability clause which insulates the remaining portions of the Act. However, the remainder of the Act is vulnerable to Kasler's equal protection challenge. The facts alleged in the complaint, if true, establish that the "list" method employed by the Act violates equal protection because it does not rationally distinguish between owners of regulated and unregulated guns who are identically situated with respect to the harm sought to be alleviated. Because this case arises on demurrer, the case must be remanded for a trial on these allegations in the complaint. Other counts as to which the demurrer was sustained have been abandoned by the failure to defend them on appeal.

II.

To place the Act in perspective, we begin with a brief discussion about the mechanics of guns and gun laws.

A.

Some guns can fire more than once without the need to break open the action, utilizing some device to feed ammunition to the chamber. The simplest family within this class consists of bolt-action, lever-action and pump-action guns which feed cartridges into the chamber as fast as the shooter operates the action. An example would be the classic Winchester rifle. Another family in this class is the "self-loading" gun, which typically uses the recoil or expanding gas of a gunshot to work the action: After a cartridge is fired, the

gun reloads itself with the next cartridge in the magazine or belt. There are two kinds of self-loading guns. Machine ("automatic") guns fire until the ammunition is exhausted or the shooter releases the trigger. Semiautomatic guns reload themselves after each shot is fired, but the trigger must be pulled each time the shooter fires.

Some machine guns are "selective fire" guns, meaning that with the flip of a lever the gun can be fired as a machine gun, or limited to firing as a semiautomatic gun. According to the late Edward Ezell, Curator of the National Firearms Collection of the Smithsonian Institution, the first "assault weapon" was the selective fire German Sturmgewehr series, introduced in World War II, which was designed to fire a shorter, less powerful, cartridge and projectile than existing rifles. (Ezell, Small Arms of the World (12th ed.1983) pp. 16-17, 514-516; Ezell, Small Arms Today (2d ed.1988) p. 457; Encyclopdia Britannica (1997 CD-Rom ed.), Technology of War Assault Weapon [articles by Ezell].) The selective fire function, the ability to fire both semi-automatic or full automatic, is a generally accepted feature of an "assault weapon" as far as arms experts are concerned. (E.g., Johnson, Small Arms Identification and Operation Guide--Free World (Defense Intelligence Agency, 4th ed.1976) pp. 127, 137, 200-201; Long, Assault Pistols, Rifles and Submachine Guns (1991) pp. 1, 10-15.) Thus, a true "assault weapon" is a type of machine gun. The Act has nothing to do with machine guns.

Semiautomatic guns have been around for over a century. (Encyclopdia Britannica (1997 CD-Rom ed Technology of War: Self-loaders.) They may be pistols, rifles or shotguns. They can have internal ("integral") magazines or detachable magazines, which can come in many sizes. Some semiautomatic guns look like or are patterned after machine guns. For example, the Israeli "Uzi" was designed as a selective fire machine gun. (Small Arms of the World, p. 122, Small Arms Today, pp. 167, 328.) But there is a semiautomatic version for consumption in the United States. Similarly, the "AR-15" (Armalite 15) family of rifles includes the selective-fire "M-16," but also includes semiautomatic

rifles, such as the AR-15 Sporter, generically referred to as "AR-15s" to distinguish them from M-16s. (Small Arms of the World, pp. 46-47, 747-748.) But many, if not most, semiautomatic guns have no relationship to automatic guns. Ordinary pistols like the current U.S. issue M9 nine millimeter series and its predecessor, the M1911 .45 caliber series, are semiautomatic and can accept detachable clips, yet neither is patterned after an automatic gun. (Small Arms Today, supra, pp. 393-394; Small Arms of the World, supra, pp. 739-740.)

However, the term "assault weapon" has entered the political lexicon, now meaning a "military-looking" semiautomatic weapon, which is frequently assumed to be the "weapon of choice" of criminals and also assumed to be readily convertible into a machine gun. (Kleck, Point Blank: Guns and Violence in America (1991) pp. 67, 70-72; Cal.Atty.Gen., Assault Weapons: Background Paper (Feb.1989) pp. 2, 4, 9-10; but see Kopel, Rational Basis Analysis of 'Assault Weapon' Prohibition (1994) 20 J. Contemp. L. 381, 392-393, 404-414 [refuting claims]; Tartaro, The Great Assault Weapon Hoax (Winter 1995) 20 Dayton L.Rev. 619, 621-636; Bea, 'Assault Weapons': Military-Style Semiautomatic Firearms (Cong. Res. Serv. (1992) pp. 3-31, 65-73 [discussing lack of conclusive data].))

B.

Early gun control laws were directed at oppressed peoples, such as slaves and freedmen, and the politically powerless, such as immigrants and religious minorities. (Powe, Guns, Words, and Constitutional Interpretation (May 1997) 38 Wm. & M. L.Rev. 1311, 1346-1347, 1375-1376; Kleck, Point Blank,supra, p. 5; Kates, Gun Control: Separating Reality from Symbolism (1994) 20 J. Cont.L. 353, 370-371; Kates, Handgun Prohibition and the Original Meaning of the Second Amendment (1983) 82 Mich. L.Rev. 204, 235-239; see Levinson, The Embarrassing Second Amendment (1989) 99 Yale L.J. 637, 656-657 & fn. 95.) California followed this pattern shortly after statehood by criminalizing the gift or sale of any gun to "any Indian."

(Stats. 1854, ch. 12, § 1, p. 24; see 1 Ann. Pen.Code, § 398 (1st ed. 1872, Haymond & Burch).) Such laws presume the proscribed class is likely to engage in crime.

Later laws focused on concealed weapons (Stats. 1863, ch. 485, § 1, p. 748, repealed 1869-1870, ch. 63, § 1, p. 67), loaded guns in public (§§ 171c, 171d, 12031; accord 2 Edw. III, ch. 3 [1 Stats. at Large 422] [illegal to ride armed in fairs, "in the presence of Justices" and so forth]), or in certain cases carrying an unloaded, unconcealed gun. (E.g., §§ 171b, 12040.)

In addition to enhancing penalties for the use or possession of a gun during a crime (e.g., Stats.1929, ch. 872, § 1, pp.1930-1932; see also e.g., §§ 12021.5, 12022, 12022.5), the Legislature has found certain guns are more likely to be used in crime and therefore has sought to control the guns themselves.

The Dangerous Weapons Act (now the Dangerous Weapons Control Law) focuses on guns "capable" of being concealed on the person, and requires dealers to record sales of such guns. (Stats.1917, ch. 145, § 3, p. 221, § 7, pp. 222-224; see § 12073.) The presumption is that guns which can be concealed are more likely to be used in crimes and therefore a record of sales of such guns deters crime or aids in the apprehension of criminals.

Guns are also regulated based on the size of the projectile (Stats. 1895, ch. 202, § 11, p. 258 [shotguns greater than a certain gauge]; § 12301, subd. (a)(1) [guns "greater than 0.60 caliber" deemed "destructive devices"]), the amount of ammunition contained (Stats.1923, ch. 430, § 1, subd. 3, p. 1003 [shotguns holding more than six shells]), or the configuration, such as disguised "cane" guns, and short-barreled shotguns and rifles (§ 12020, subd. (a)).

The entire class of automatic weapons has been severely restricted in California for many years. (Stats.1927, ch. 552, § 1, p. 938; see § 12200 et seq.) In the National Firearms Act of 1934, the federal government also elected to impose restrictions, including taxation and registration, on

"destructive" weapons such as machine guns and sawed-off shotguns. (See United States v. Miller (1939) 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206; Hardy & Stompoly, Of Arms and the Law (1974) 51 Chi-Kent L.Rev. 62, 63-64.) This trend was expanded by a provision of the Omnibus Crime Control and Safe Streets Act of 1968, the Gun Control Act of 1968, which among other things, limited the importation of guns, generally speaking, to those deemed suitable for sporting purposes. (18 U.S.C.A. § 925(d)(3); see Gun South, Inc. v. Brady (11th Cir.1989) 877 F.2d 858, 861-862; Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (July 6, 1989).) Such determination is made by the Treasury Secretary, upon recommendation of the Bureau of Alcohol, Tobacco and Firearms. (See Thompson, Form or Substance? Definitional Aspects of Assault Weapon Legislation (1990) 17 Fla.St.U.L.Rev. 649, 658-666 (Thompson).)

Prior to the Act, statutes rarely named a particular gun, such as a Florida statute regulating possession of "a pistol, Winchester rifle or other repeating rifle[.]" (See Watson v. Stone (1941) 148 Fla. 516, 4 So.2d 700, 701.) However, the inclusion of the manufacturer's name was merely illustrative of the category sought to be regulated, namely repeating rifles.

We are unaware of any statute predating the Act which regulates guns based on a list identified by make and model. Some California municipalities passed local "assault weapon" ordinances prior to the Act. Some employed the "list" method. (E.g., former Sacto. City Code, ch. 48, § 48.01.011 et seq., Ord. No. 89-023.) Others defined "assault weapons" by generic description and illustrative list. (E.g., Los Angeles Mun.Code, § 55.05 et seq., Ord. No. 164,388 ["semiautomatic action, center fire rifle or carbine which accepts a detachable magazine with a capacity of twenty rounds or more, including but not limited to the following firearms or their copies ... "]; Davis Mun.Code, § 17-23 et seq., Ord. No. 1508 [similar].) We express no view on the validity of these ordinances.

Some statutes, consisting of a list of guns, were passed after the Act, and are similarly structured. An example is the Columbus, Ohio, ordinance struck down in Springfield Armory, Inc. v. City of Columbus (6th Cir.1994) 29 F.3d 250 (Springfield). Others include a federal statute, the Violent Crime Control and Law Enforcement Act of 1994, and a Denver, Colorado, ordinance largely upheld in Robertson v. City and County of Denver (Colo.1994) 874 P.2d 325 [29 A.L.R.5th 837] (Robertson), which ban weapons that fit certain objective descriptions, such as any semiautomatic gun with a detachable magazine of a certain size, or with certain features, such as folding stocks, pistol grips, bayonet mounts, and so forth. (18 U.S.C.A. § 921(A)(30); see Lenett, Taking a Bite Out of Violent Crime (1995) 20 Dayton L.Rev. 573, 602-609; but see Peoples Rights Organization v. City of Columbus (S.D.Ohio 1996) 925 F.Supp. 1254 [finding much of new Columbus, Ohio, ordinance, following this pattern, to be vague].) Such objective criteria are absent from the California Act, to which we turn.

III.

On January 17, 1989, a mentally disturbed man fired 105 bullets into a Stockton schoolyard. He killed five children and wounded many others. He used a semiautomatic rifle, which physically resembled a Soviet-bloc AK-47, but was not. He then shot himself with a pistol. (See Kempsky, Report to Attorney General: Patrick Edward Purdy and the Cleveland School Killings (Oct.1989) pp. 1-2, App. C, pp. 23-24.) This animated existing but stalled legislative efforts to do something. But what?

According to materials either attached to the complaint or judicially noticeable, some wanted to ban all semiautomatic weapons. Others wanted to create a commission which would select which weapons to ban and which to allow. (See Sen. BillNo. 292 (1989-1990 Reg. Sess.) as introduced Jan. 26, 1989.) Eventually it was decided to create a list of semiautomatic guns by make and model. One proposal was to list allowable guns and ban the rest. This idea was discarded in favor of creating a list of banned guns.

Ultimately, the Act was passed. It consists broadly of four parts: a list of so-called "assault weapons," a mechanism for adding other guns to the list (apart from legislative amendment), a registration system, and penal provisions.

Kasler insinuates the Act was passed to advance political, not societal, ends. We do not review the motives of individual lawmakers and the collective motives of the Legislature are reflected in the words of statutes and not elsewhere. (People v. Knowles (1950) 35 Cal.2d 175, 182, 217 P.2d 1; see Fletcher v. Peck (1810) 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162, 176.)

The stated intent of the Act is as follows: "The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent ... to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (§ 12275.5.)

Thus, it is supposed that an "assault weapon" as that term is used by the Legislature, (1) has a high "rate of fire," (2) has a high "capacity for firepower," (3) has little utility "as a legitimate sports or recreational firearm," or such utility "is substantially outweighed by the danger that it can be used to kill and injure human beings," and (4) is not "primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." (§ 12275.5.)

An uncodified portion of the Act provides: "The Legislature finds and declares that the weapons enumerated in Section 12276 of the Penal Code are particularly dangerous in

the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens. It is the intent, therefor, to ban the weapons enumerated in Section 12276 of the Penal Code and any other models which are only variations of these weapons, which are the same weapon but manufactured or sold by another company under a licensing agreement, or which are new models manufactured or sold by any company with just minor modifications or new model numbers in order to circumvent the prohibitions of [the Act.]" (Stats.1989, ch. 19, § 5, pp. 69-70.) There is no reference in the Act to the lawful, defensive use of guns.

Section 12276 (the "list") then "defines" an "assault weapon" as any gun in one of four categories, as follows: Subdivision (a) lists several rifles by manufacturer's name and model designation, except that in two cases the term "series" is used, as in "AK series" and "Colt AR-15 series." (Subd. (e) provides: "The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.") Subdivision (b) lists several pistols. Subdivision (c) lists three shotguns. Subdivision (d) states that an "assault weapon" is "Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5."

Subdivision (f) explains it is the Legislature's intent to ban "the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons." It does not appear that the language of this provision specifying "any other models" is self-executing; in other words, those guns must still be "added on."

The add-on procedure in section 12276.5 operates as follows:

> First, the Attorney General files a petition in certain superior courts, whereupon the court "shall issue a declaration of temporary suspension of the manufacture, sale, distribution, transportation, or importation into the state, or the giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276 because the firearm is either of the following: (1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in [§ 12276] which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount. The court shall strictly construe this paragraph so that a firearm which is merely similar in appearance but not a prototype or copy cannot be found to be within the meaning of this paragraph. [¶] (2) A firearm first manufactured or sold to the general public in California after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in [§ 12276], or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in ... [§ 12276], regardless of the company of production or distribution, or the country of origin." (§ 12276.5, subd. (a).)

Then, "after the Attorney General has completed the notice requirements of subdivisions (c) and (d), the provisions of subdivision (a) of Section 12280 shall apply with respect to those weapons," meaning that criminal penalties for violations of the Act are in effect. (§12276.5, subd. (b).)

The notice requirements are as follows: "Upon declaration of temporary suspension, the Attorney General shall

immediately notify all police, sheriffs, district attorneys, and those requesting notice pursuant to subdivision (d), shall notify industry and association publications for those who manufacture, sell, or use firearms, and shall publish notice in not less than 10 newspapers of general circulation in geographically diverse sections of the state of the fact that the declaration has been issued." (§ 12276.5, subd. (c).) In turn, section 12276.5, subdivision (d), requires the Attorney General to keep a list of people asking for notice of add-on actions and requires the Attorney General to notify those people, as well as known manufacturers and distributors of such add-on actions.

Subdivision (e) requires the court to set a hearing "on a permanent declaration.... Any manufacturer or California distributor of the weapon which is the subject of the temporary suspension order has the right, within 20 days of notification of the issuance of the order, to intervene in the action," but others, such as weapon owners, "may, in the court's discretion, thereafter join the action as amicus curiae."

The Attorney General must prove the gun "is an assault weapon. If the court finds the weapon to be an assault weapon, it shall issue a declaration that it is an assault weapon under Section 12276. Any party to the matter may appeal the court's decision. A declaration that the weapon is an assault weapon shall remain in effect during the pendency of the appeal unless ordered otherwise...." (§ 12276.5, subd. (f).)

The Attorney General must prepare a pictorial booklet (§ 12276.5, Subd.(g)), and "shall promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations. Any declaration that a specified firearm is an assault weapon shall be implemented by the Attorney General who, within 90 days, shall promulgate an amended list which shall include the specified firearm declared to be an assault weapon. The Attorney General shall file the amended list with

the Secretary of State for publication in the California Code of Regulations." (§ 12276.5, subd.(h).)

Owners of banned guns must register them pursuant to a grandfather provision, which requires fingerprinting and payment of a fee; thereafter the gun(s) may be possessed in certain places but cannot be transferred except to a gun dealer or the police, or outside the state. (§ 12285, subd. (b).) Violation of the Act can result in severe punishment. The sale, gift or loan of a gun on the list is a felony punishable by up to eight years' imprisonment. (§ 12280, subd. (a).) There is a lenity provision for people who possessed a banned gun before the Act (or the gun was added on) but failed timely to register it: Such persons are guilty of but an infraction. (Id., subd. (b).)

IV.

To repeat, under the add-on procedure, the Attorney General must prove "that the weapon which is the subject of the declaration of temporary suspension is an assault weapon. If the court finds the weapon to be an assault weapon, it shall issue a declaration that it is an assault weapon under Section 12276. ... " (§ 12276.5, subd. (f).) This procedure cannot be upheld.

A.

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) The constitution also vests limited legislative power in the Governor to veto or sign a bill (Cal. Const., art. IV, § 10), and to propose the annual "Governor's Budget," which begins the budget cycle (Cal. Const., art. IV, § 12). But judges are given no constitutional grant of even limited legislative power and thus judges rarely exercise legislative power.

The judiciary has no general power to enact or order the enactment of laws. (Myers v. English (1858) 9 Cal. 342, 349; County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 76-77, 222 Cal.Rptr. 750.) "A separation of powers does allow for some incidental overlap of function. [Citation.] But a judicially compelled enactment of legislation is not an incidental overlap; it is the very exercise of legislative power itself." (City of Sacramento v. California State Legislature (1986) 187 Cal.App.3d 393, 399, 231 Cal.Rptr. 686.) The judiciary does exercise specific legislative power in two cases. First, the judiciary may order appropriations for self-preservation. (Millholen v. Riley (1930) 211 Cal. 29, 33-34, 293 P. 69.) Second, in rare instances the judiciary may rewrite an initiative statute to secure it from attack. (Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Just as the Legislature cannot reconsider court judgments, the judiciary may not reconsider legislative "judgments," in other words, amend statutes. (Mandel v. Myers (1981) 29 Cal.3d 531, 547-549, 174 Cal.Rptr. 841, 629 P.2d 935.) It is the Legislature which defines crimes. (People v. Knowles, supra, 35 Cal.2d at p. 181, 217 P.2d 1.) The Legislature cannot bestow legislative power on judges. For example, in Epperson v. Jordan (1938) 12 Cal.2d 61, 82 P.2d 445, the California Supreme Court invalidated statutes which tried to draft members of this court to write titles for initiative measures because "they purport to confer nonjudicial duties on the appellate justices...."

In this case, the "add-on" provisions require a judge, upon petition of the Attorney General, effectively to amend the list. In so doing, the judge must determine whether either of the following is true: The gun is "Another model by the same manufacturer or a copy by another manufacturer of an assault weapon" on the "list," or the gun is a newly manufactured or sold firearm "which has been redesigned, renamed, or renumbered from one of the firearms" on the "list," or "which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms" on the "list." (§ 12276.5, subd. (a).) The judge's determination of

this issue is "a declaration that it is an assault weapon under Section 12276." (Id., subd. (f).) This "declaration" is, in form and purpose, an expansion of the statutory "list."

The Legislature did not intend superior court judges to be mere rubberstamps. But by what reasoning does a judge determine whether a gun is merely "redesigned" from another or has modifications or enhancements which are but "slight?" What is "slight" enough or "redesigned" enough? These unfettered legislative policy choices illustrate why judges should not engage in the activity of amending statutes.

It is true, as the Attorney General points out, that in some cases administrative agencies may amend lists. For example, as discussed earlier, the Gun Control Act of 1968 empowers the Secretary of the Treasury to decide what is "sporting" weaponry for the purpose of limiting importation. A better analogy is found in the drug arena, where federal administrative agencies have the ability to classify drugs on various schedules, a classification which can result in criminal penalties in some cases. Touby v. United States (1991) 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219, upheld a statute allowing the Attorney General of the United States (or his subdelegate, the Drug Enforcement Agency) to add new "designer" drugs to the controlled substances categories by means of an expedited administrative declaration. The United States Supreme Court sustained this delegation of authority to "legislate" against a separation of powers challenge, because the statute "set forth ... an 'intelligible principle' to constrain the Attorney General's discretion [.]" (500 U.S. at p. 165, 111 S.Ct. at p. 1755, 114 L.Ed.2d at p. 227.)

The Attorney General and amici here see an analogy, because as the chief law enforcement officer of California, the Attorney General has the wherewithal to determine when newly "redesigned" or "renamed" guns appear. In their view the requirement that he obtain the imprimatur of a judge provides added protection to gun owners. Amici assert: "The [Act] provides even greater checks than the federal controlled substance law against potential abuse of such authority by requiring automatic judicial review to ensure that the Attorney

General has complied with the statutory criteria." But in defending against certain due process claims, amici argue the add-on hearing is quasi-legislative and the Act requires "the Attorney General to demonstrate his compliance with the statutory criteria by a preponderance of the evidence in a trial-type adversary hearing." This inconsistency highlights the defect in the Act: The issue at the "trial" is whether the gun should be banned; that is a legislative question.

Under the Act the authority to add guns to the list resides with the judge, not the Attorney General. The judge does not merely review the Attorney General's exercise of discretion. The ensuing judgment is not a judgment validating any decision by the Attorney General, it is a judgment amending the list.

We agree with the Attorney General that the separation of powers doctrine does not "prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch. [Citation.]" (Younger v. Superior Court (1978) 21 Cal.3d 102, 117, 145 Cal.Rptr. 674, 577 P.2d 1014, original italics.) But the Act requires a judge to legislate. That goes too far. The "add-on" provision of the Act, embodied in section 12276.5, is unconstitutional and unenforceable.

B.

Kasler also raises several due process claims, some of which are based on the inability of some people to participate in or learn about the "add-on" hearing. There is no general right to participate in or receive notice of pending legislative hearings and we construe the suspension ("add-on") hearing to be such a hearing, albeit for that reason unconstitutional.

But there is a general right to notice of the law's proscriptions, which must be sufficiently clear to permit a reasonable person to comply and provide the authorities with guidelines to prevent arbitrary enforcement. (People v. Superior Court (Caswell) (1988) 46 Cal.3d 381, 389-390, 250 Cal.Rptr. 515, 758 P.2d 1046.)

First, the Act deprives citizens of notice of the law because there is a temporal gap between the declaration of suspension and publication of notice thereof. During that period of time the Act treats the gun as an "assault weapon," meaning a person could be a felon for lending it to a fellow hunter. (§ 12280, subd. (a)(1); cf. § 12280, subds. (b), (e) [simple possession is generally not a crime until 90 days after the gun "was specified as an assault weapon"].) But at that moment in time, the new "list" has yet to be published to the world. There is literally no "notice" of the law. Once the court issues a permanent declaration that the firearm is an "assault weapon," the Attorney General must promulgate and forward to the Secretary of State for publication a new list of guns. (§ 12276.5, subd. (h).) The new "list" is effective before it is published. This is intolerable. The Attorney General assures us that a person in such a situation would not be prosecuted, and posits that peace officers could always ask suspects whether or not they knew of the temporary suspension, and suggests that a court reviewing a conviction under these circumstances would construe the statutes as requiring actual notice of the suspension. With respect, this pledge of nonprosecution, however earnestly given, does not satisfy a citizen's right to notice of the law. History teaches that "Trust us" is no guarantee of due process.

Second, the Act is vague because it defines the weapons which can be added on as those with "slight" modifications and those which have been "redesigned, renamed, or renumbered" from guns on the list. (§ 12276.5, subd. (a)(1), (2).) Reasonable persons can understand renaming and renumbering. But what is a "slight" modification, or a "redesign?" Shortening a barrel would probably be both a "slight" modification and a "redesign." But what if a manufacturer used the same lower receiver, but changed the barrel, grip, magazine and caliber? How is an ordinary person supposed to know that a completely different-looking gun inspired the designer into creating the new gun? How is a reasonable person supposed to know the genealogy of the weapon? (See Robertson, supra, 874 P.2d at pp. 334-335 ["we are not persuaded that simply because publications exist

which contain the information needed to establish the design history of a pistol, that this saves [part of a Denver, Colorado, ordinance] from being vague. Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law"]; Springfield, supra, 29 F.3d at pp. 252-253; cf. Richmond Boro Gun Club Inc. v. City of New York (2d Cir.1996) 97 F.3d 681, 683-685 [objective ordinance not vague].)

We reject the claim that "assault weapon" owners are always on notice about the potential for an "add-on" because guns are heavily regulated. (See Staples v. United States (1994) 511 U.S. 600, 608-615, 114 S.Ct. 1793, 1798-1802, 128 L.Ed.2d 608, 618-622 [rejecting similar claim because of long tradition of lawful gun ownership in this country].)

C.

Severability is a murky subject. Generally speaking, "The problem is twofold: the legislature must have intended that the act be separable, and the act must be capable of separation in fact." (2 Sutherland, Statutory Construction (5th ed. 1993) Separability, § 44.03, p. 495, fn. omitted.) We have little trouble with the latter point: Structurally, a list coupled with an enforcement mechanism (registration and penal provisions) would remain, thus the Act is physically or grammatically severable. It is the former requirement, which is usually the second analytical step (People's Advocate, Inc. v. Superior

Court (1986) 181 Cal.App.3d 316, 330, 226 Cal.Rptr. 640), which is doubtful. Many cases fail to articulate that requirement because usually the defective part of a law is so clearly unimportant with respect to the statute as a whole that the point is not arguable and the court simply articulates the first step (grammatical severability) and the conclusion. However, "[t]he law enforced after separation must be reasonable in light of the act as originally drafted." (Sutherland, supra, § 44.04, p. 502.) "If by sustaining only a part of a statute, the purpose of the act is changed or altered, the entire act is invalid." (Id., § 44.07, p. 518, fn. omitted.)

In California the test has been stated in several ways, including: "whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. [Citations.]" (Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 238, 18 Cal.Rptr. 501, 368 P.2d 101.) A casual reading of this case and others like it would suggest that if any utility remains in the redacted statute, it is severable. (See also Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 261, 45 Cal.Rptr.2d 207, 902 P.2d 225.) Indeed, one might be tempted so to find, under the often enunciated but rarely examined "principle" that there is a presumption in favor of a finding of severability. But this obscures the proper analysis of the second, "intent" step. If a redacted statute has no utility, it is unreasonable to suppose that the Legislature would have passed it, for we presume the Legislature does not engage in idle acts. (Stafford v. Realty Bond Service Corp. (1952) 39 Cal.2d 797, 805, 249 P.2d 241; see Civ.Code, § 3532.) Utility is thus a necessary condition to a finding of severability. But it does not suffice.

The correct analysis is more complex: "Deletion of the challenged provision would leave a coherent amended statute complete in itself, but the critical inquiry is whether the Legislature would have adopted the entire amendment had it foreseen the partial invalidity thereof? [Citation.]" (People v. Navarro (1972) 7 Cal.3d 248, 260, 102 Cal.Rptr. 137, 497 P.2d 481; see In re Bell (1942) 19 Cal.2d 488, 497-498, 122 P.2d 22.) While discussing whether an initiative was severable, we said "the provisions to be severed must be so presented to the electorate in the initiative that their significance may be seen and independently evaluated in the light of the assigned purposes of the enactment. The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (People's Advocate, Inc., supra, 181 Cal.App.3d at pp. 332-333, 226 Cal.Rptr. 640, italics added, approved in Gerken v. Fair Political

Practices Com. (1993) 6 Cal.4th 707, 714-715, 25 Cal.Rptr.2d 449, 863 P.2d 694, (lead opn. of Lucas, C.J.) and Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 821-822, 258 Cal.Rptr. 161, 771 P.2d 1247.) The test is not whether it is reasonable to suppose the Legislature would have acted in a certain way. Supposition or speculation does not suffice. We should not presume to state what the Legislature would have done unless we can do so "with confidence."

The Sixth Circuit was faced with a similar task when reviewing a law modeled after the Act. The original Columbus, Ohio, ordinance contained a list of weapons, and included "Other models by the same manufacturer with the same action design that have slight modifications or enhancements" of guns on the list. (See Springfield Armory, Inc. v. City of Columbus (S.D.Ohio 1992) 805 F.Supp. 489, 491.) After invalidating the "slight" modification provision as vague, the Sixth Circuit declined to leave the list intact: "The legislation does not include a severability clause. We have no way to know whether the local legislature would have enacted the assault weapons ban without the 'slight modifications' provision. [Citations.] Apparently the city council simply copied the ordinance from a California ordinance. Here, the catch-all phrase is the only element that brings any generality to the measure. The provision seems integral to the ordinance since without it manufacturers could circumvent the ban by merely changing the names of the listed weapons. In view of the arbitrary nature of the ordinance and the historical presumption of inseverability in the absence of a severability clause, we conclude that we should not try to save the assault weapon portion of the ordinance but rather that we should leave it to the local legislature to draft another ordinance that does not suffer from the same defects as this one. [Citations.]" (Springfield, supra, 29 F.3d at p. 254; cf. Robertson, supra, 874 P.2d at p. 335 [severability clause present, minor part of ordinance vague, held: rest of ordinance severable].)

The "presumption of inseverability" mentioned in Springfield is, at best, "a weak one." (See Sutherland, supra, § 44.09, p. 526.) Nonetheless, the conclusion reached by Springfield is sound. Here the object was to regulate those

semiautomatic guns which posed the greatest "threat to the health, safety, and security of" Californians (§ 12275.5) and the Legislature knew this could not be done with a bare list. Strong objections to this type of law exist. (See Kleck, Targeting Guns: Firearms and Their Control (1997) Search for 'Bad' Guns, pp. 111-112 ["this severely limits the impact of regulation by allowing an ample supply of legally available semiautomatic models to be substituted for the handful of banned models"]; Thompson, supra, 17 Fla.St.U.L.Rev. at pp. 667-668 ["While this form of regulation may achieve its goals initially, it will become less and less effective and require constant attention"].) Gun-control supporters have pointed out that creating a list "is problematic. 'If the real difference between an AK-47 [sic] and other semi-automatic firearms is only the people who are using the AK-47 this month,' asks law professor Franklin Zimring of the University of California, Berkeley, 'what is to stop them from switching to other semi-automatic weapons?' ... Since a criminal can switch weapons far more easily than a legislature can add weapons to a list, it makes more sense to use some of the BATF [objective] standards to determine which weapons should be subject to the ban." (Abrams, Ending the Other Arms Race: An Argument for a Ban on Assault Weapons (1992) 10 Yale L. & Pol'y Rev. 488, 498-499, fn. omitted; Lenett, supra, 20 Dayton L.Rev. at p. 604 ["for a truly effective ban, it is not enough for Congress just to list the prohibited weapons, no matter how long [the] list"].)

Although it is not given to us to decide that the Legislature would (or should) have heeded these and other objections, had the Legislature known the add-on provisions would not be sustained, it might have chosen to adopt another proposal considered before passage of the Act, such as creating an assault weapon commission, regulating all semiautomatic weapons, or all but a specified list, or doing nothing pending further study. We agree with the Sixth Circuit's conclusion in Springfield that stripping from the Act "the only element that brings any generality to the measure" militates strongly against a finding of severability. (29 F.3d at p. 254.) Although a skeletal structure might remain, we are

not "confident" that the Legislature would have proceeded in this manner.

However, the Act has an uncodified severability clause: "If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." (Stats.1989, ch. 19, § 4, p. 69.) The presence or absence of such a clause is but informative, not dispositive, on the question of intent. (1 Cooley's Constitutional Limitations (8th ed. 1927) Declaring Legislative Acts Unconstitutional, p. 368; Sutherland, supra, § 44.08, pp. 521-522.) The effect of this clause is to compel severability if the remainder of the Act has "any utility." It provides that we must sustain provisions "which can be given effect" without reference to the invalid provisions. Here the remaining portions of the Act, although substantially emasculated, "can be given effect." In the circumstances of this case the severability clause is sufficient to salvage the remainder of the Act.

V.

The trial court rejected Kasler's equal protection claims. This was error. Kasler stated a viable claim for relief.

A.

We emphasize that we must accept as true the facts stated in the complaint and judicially noticeable, not arguments and conclusions of law. (Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal.2d 317, 329, 253 P.2d 659.)

Kasler's complaint alleges the Act is underinclusive because it does not list weapons which have the same or greater rate of fire and capacity for firepower nor weapons identical to weapons on the list.

First, the complaint alleges the Act omits from the list guns which are "functionally indistinguishable" from guns on the list, or "indistinguishable (vis a vis the Act's rationales) [from] the arms listed." For example, the Heckler and Koch PSG-1 sniper rifle (listed) fires the standard NATO 7.62

millimeter cartridge (".308 Winchester") and uses a five-round magazine. However, the Communist-bloc Dragunov SVD sniper rifle (not listed) fires "the Russian 7.62 x 54 high power military cartridge" or "the old military 7.92x57 mm., though it may also be, or have been available in .308 Winchester." Several other examples are stated in the complaint.

Second, the complaint alleges some guns omitted from the list are identical to guns on the list. In later pleadings, but not the complaint, this category is referred to as "clones." For example, the Springfield BM-59 is on the list, but the Act omits "the Beretta BM-59 rifle of which the Springfield is an identical copy.... The Beretta BM-59 is made by the Beretta company in Italy; the Springfield BM-59 is imported by Springfield from Italy and sold under its own name." (Original emphasis.) Incorporated into the complaint is a memorandum prepared for the Attorney General by the Assistant Director of the Investigation and Enforcement Branch of the Department of Justice, purporting to outline the legislative process resulting in the Act but also relating specific factual allegations. It emphasizes that there are weapons "exactly the same as weapons on the list ... only the company name on the receiver is different." We also observe that the current version of the booklet mandated by section 12276.5 cautions that "the Springfield Armory BM-59 has the specified markings and is an 'assault weapon' pursuant to California law. However, the Springfield Armory M1A, which appears to be almost identical but has different identification markings, is not specified as an 'assault weapon.'" (Cal.Atty.Gen., Assault Weapons Identification Guide (April 1993) Foreword, p. iv.) At oral argument and in his brief Kasler fleshed out the "clone" category as follows: "If the banned Colt and the 18 unregulated [AR-15] clones are disassembled into a common container, 19 'new' rifles can be reassembled willy-nilly from the jumble of interchangeable, indistinguishable parts. The only parts which are distinguishable ... are the receivers, and that only because they bear the firearm's name."

The complaint pleads "all detachable magazine firearms have the same capacity [for firepower]." For example, "The AR-15 Sporter and Ruger [Mini-14/30 series rifles] come with 5-round magazines, but another manufacturer's 30-round magazine is designed to fit both interchangeably; various manufacturers sell different 30, 60, or more, round magazines for all three." Further, "The one major distinction between most semi-automatic (and other) hunting arms and most of the arms classified by the Act [as assault weapons] is that the latter are much less deadly to human beings. This is because the arms classified in the Act [except a few] are calibered for down-powered current military ammunition or the even less deadly ammunition of pistols. Military ammunition is designed to maximize wounding, not killing, in deference to the Laws of War and to less humane logistical considerations." There is support for this claim in the fact that, generally speaking, international law bans weapons which cause "superfluous injury." (See Parks, Joint Service Combat Shotgun Program (Oct.1997) Army Lawyer 16, 18.)

The complaint pleads the listed guns are not disproportionately used in crime, and although, as stated above, there is academic support for this claim, we do not enter into that debate.

To establish the fallacy of classifying weapons based on their subjective "dangerous" or "ugly" appearance, the complaint pleads that "The arms classified by the Act differ cosmetically from older civilian hunting arms (many of which are also semi-automatic) in being designed and fabricated with modern materials like high-strength plastic. While these modern arms may be less aesthetic, these materiel and design changes result in increased durability, ruggedness and simplicity of design which make these arms superior for hunting, camping, Olympic biathlon competition, and for farmers, ranchers and others desiring arms for pest and predator control." The complaint includes pictures which demonstrate that many guns not on the list are as "military" or "menacing" in appearance as listed guns.

The complaint alleges the most popular semi-automatic rifles (Ruger Mini 14, M1 Carbine and M1 Garand) were omitted from the list, notwithstanding their functional equivalence to rifles placed on the list. "The effect of the Act has not been a reduced market in 'assault weapons,' but only to give Ruger a virtual monopoly in the most popular single caliber (.223)." Other guns which cannot be added on because of limitations in the add-on provisions could be built and marketed though they, too, are "functionally identical to" listed guns.

B.

The equal protection guarantees of our state constitution are contained in three provisions which parallel federal equal protection rights afforded by the Fourteenth Amendment. (See Cal. Const., art. I, § 7, subds. (a) [equal protection] and (b) [privileges and immunities] and art. IV, § 16, subd. (a) [uniformity of laws]; Steffes v. California Interscholastic Federation (1986) 176 Cal.App.3d 739, 745-746, & fn. 2,222 Cal.Rptr. 355.) There being no claim of a so-called "suspect classification" calling for "heightened scrutiny," we apply the rational basis test, whereby "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (Cleburne v. Cleburne Living Center (1985) 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320.) "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. [Citation.]" (Nordlinger v. Hahn (1992) 505 U.S. 1, 9, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12.) In a case considering the three state constitutional provisions the California Supreme Court explained: "None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. [Citations.] A law to be general in its scope need not include all classes of individuals in the state. Nor is a classification void because it does not embrace within it every other class which might be included.

[Citations.] Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous." (Sacramento M.U. Dist. v. P.G. & E. Co. (1942) 20 Cal.2d 684, 693, 128 P.2d 529.)

The tenor of Kasler's complaint is that the facts alleged therein are superior to the facts found by the Legislature. "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' [Citations.] [¶] Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, [citation] they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' [Citation.] Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (Minnesota v. Clover Leaf Creamery Co. (1981) 449 U.S. 456, 464, 101 S.Ct. 715, 723, 66 L.Ed.2d 659, 668-669, fn. omitted.)

However, when the Legislature chooses to draw lines, that is, "discriminate" within a given class, the discrimination must be rational in light of the harm to be alleviated. (Hays v. Wood (1979) 25 Cal.3d 772, 791, 160 Cal.Rptr. 102, 603 P.2d 19.) More particularly, as stated by Justice Robert Jackson, "A classification is reasonable, however, only if there are differences between the classes and the differences are reasonably related to the purposes of the statute. [Citations.] 'As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of

differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. [Citations.]' (Mr. Justice Jackson, concurring in Railway Express Agency v. New York [1949] 336 U.S. 106, 115, 69 S.Ct. 463, 468, 93 L.Ed. 533.)" (Werner v. Southern Cal. etc. Newspapers (1950) 35 Cal.2d 121, 131-132, 216 P.2d 825, quotation approved in Hays v. Wood, supra, 25 Cal.3d at pp. 786-787, 160 Cal.Rptr. 102, 603 P.2d 19.) Therefore, we must conduct a "'serious and genuine judicial inquiry'" into the correspondence between the classification and the legislative goals. (Id. at p. 787, 160 Cal.Rptr. 102, 603 P.2d 19.)

In this case the Legislature has identified two dangers associated with so- called "assault weapons," namely a high rate of fire and a high "capacity for firepower." Kasler pleads that other semi-automatic guns have equal or greater rates of fire and capacity for firepower, yet they were left off the list. Thus, he has pleaded that, with respect to the harm to be alleviated, the Legislature acted irrationally. As expressed with a more familiar example in Kasler's brief, "Drunken driving clearly menaces public safety. Yet it would clearly be irrational to ban drunken driving of a Toyota Corolla, Dodge Caravan, Ford Probe, Mazda Navajo or Chrysler Concorde while allowing it in their respective twins, the Geo Prizm, Plymouth Voyager, Mazda MX-6, Ford Explorer, Dodge Intrepid and Eagle Vision."

Arguably, although not included within the express statement of legislative intent behind the Act, in part, the harm herein is one of perception--that so-called "military style" weapons, meaning the "ugly" or "notorious" ones, are bad and the others are good. It is the recurrent theme of the complaint that a classification based on perception of evil is impermissible. We disagree. The Legislature bears the onerous duty of maintaining a system of laws which will protect the citizens of this State from a limitless horizon of

evil. Violent criminals do not always act rationally. A robber may choose a semiautomatic Uzi pistol for no other reason than that it looks "uglier" than a functionally identical Smith and Wesson or Sig Sauer police-issue handgun. The rate of fire and capacity for firepower of the two may be the same; indeed, the Uzi may be less accurate, less concealable and more cumbersome in the felon's hands. But he may choose the Uzi nonetheless because it makes him feel powerful and because his victims may fear the Uzi more than an "ordinary" semiautomatic weapon. "Such weapons afford their users a sense of power and, in fact, enhance the dangerousness of such persons." (Yarvis, A Psychological Autopsy, App. A, p. 12, in Kempsky & Binkerd, Report to Attorney General, supra; see Cal.Atty.Gen., Assault Weapons: Background Paper (Feb.1989) pp. 3-4 ["They are glamorized in ways that particularly appeal to young men, who make up the overwhelming majority of criminals. The sense of power conveyed simply by owning one of these weapons is heady"]; Long, Assault Pistols, supra, at p. 8 [noting the "Walter Mitty" appeal of semiautomatic versions of machine guns].)

In short, perceptions matter, and the Legislature is free to draw a distinction between otherwise mechanically identical weapons because, in its collective judgment, some were meaner-looking than others, as the complaint pleads: "The 'assault weapons' list seems to have been compiled by selecting from a picture book firearms which, it was felt looked 'bad.'"

But liberally construed, Kasler pleads (pictorially and otherwise) that some guns are equally "mean looking" and that others are physically identical. In other words, even assuming that "ugliness" constitutes an unstated but valid "harm" the Legislature sought to alleviate, the Act defies rationality.

As indicated, the term "assault weapon" itself adds nothing to our discussion because a gun only becomes an "assault weapon" by virtue of its inclusion on the assault weapons list, not because of any objective quality that

discriminates between "assault weapons" and other semiautomatic guns.

Also unavailing is reference to the uncodified statement of intent, which states that the guns on the list "are particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens." (Stats.1989, ch. 19, § 5, pp. 69-70.) This facially plausible "finding" cannot insulate the Act if the finding itself is arbitrary and irrational. (See Professional Engineers v. Department of Transportation (1997) 15 Cal.4th 543, 569, 63 Cal.Rptr.2d 467, 936 P.2d 473, see also American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 349-350, 66 Cal.Rptr.2d 210, 940 P.2d 797 (lead opn. of George, C.J.).) If the allegations of the complaint are true, the listed guns are no more dangerous in the hands of criminals than the functionally indistinguishable guns, nor than the identical (clone) guns. Nor do they have a greater rate of fire, capacity for firepower, nor pose a greater danger of use "to kill and injure human beings." (§ 12275.5).

We are not the first court to reach such a conclusion. Although the Sixth Circuit invalidated the Columbus ordinance as facially vague, one ground of vagueness was irrationality because the ordinance "outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. The ordinance does not achieve the stated goal of the local legislature--to get assault weapons off the street. The ordinance purports to ban 'assault weapons' but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections. Many assault weapons remain on the market and the consumer is without a reasoned basis for determining which firearms are prohibited. The ordinance permits the sale and possession of weapons which are virtually identical to those listed if they are produced by a manufacturer that is not listed. Thus, the Springfield SAR-48 is banned but equivalent designs sold by Browning Arms Company, Paragon Sales and Armscorp are not. The Springfield BM59 is banned but the equivalent Beretta BM59 and BM62 are not banned. The Colt

AR-15 Sporter is banned but not identical weapons sold by Bushmaster, SGW/Olympic Arms, [and others]. The Ruger Mini-14 rifle, which shoots .223 caliber cartridges from a detachable box magazine just like the Colt AR-15 Sporter, is not prohibited. [Citation.]" (Springfield, supra, 29 F.3d at p. 252.)

Further, in Citizens for a Safer Community v. City of Rochester (1994) 164 Misc.2d 822, 627 N.Y.S.2d 193, the court (on summary judgment) struck down a portion of a local ordinance which named particular guns: "For example, the Ordinance specifically names the Colt AR-15A2 carbine, AR-15A2 Delta H-Bar, and AR-15A2 H-Bar. It does not list the identical Eagle Arms EA- 15, Olympic Arms AR-15 [and others]. It further references the Springfield Armory BM-59 without making reference to the identical Italian made Beretta BM- 59. [¶] ... If this portion of the Ordinance was permitted to stand, two citizens could potentially be treated in a wholly unequal fashion if they possessed identical AR-15's made by different manufacturers. One would be subject to imprisonment, fine and loss of property; and the other would not be breaking the law. Moreover, two manufacturers, each producing identical weapons, would be treated unequally because one would be able to sell his weapons within the City of Rochester and the other would not. [¶].... Therefore, to the extent [the ordinance] names individual weapons, and excludes others that are identical, it is a violation of the equal protection clause [.]" (Id. at pp. 837-838, fn. omitted, 627 N.Y.S.2d at pp. 203-204.)

There is a case supporting the Attorney General's position. In Benjamin v. Bailey (1995) 234 Conn. 455, 662 A.2d 1226 (after a lower court trial) the Supreme Court of Connecticut agreed with our conclusion herein that "the record indicates that the banned weapons [on a similar "list"] cannot meaningfully be differentiated from weapons that are not banned." (Id. at p. 472, 662 A.2d at p. 1235.) But the Benjamin court rejected the equal protection challenge on two grounds: First that guns were not "persons," an argument not tendered herein and which overlooks the fact that it is the persons who make and own guns who are penalized; and

second because "The plaintiffs, ... have offered no evidence whatsoever suggesting that the legislature knew that any of the unproscribed weapons posed as great a threat to the welfare of the residents of this state as do the proscribed weapons. [Citations.]" (Id. at p. 479, 662 A.2d at pp. 1238-1239.) The court applied the familiar rule that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation.]" (Williamson v. Lee Optical Inc. (1955) 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573.)

Amici essentially take this approach in defending the Act against the equal protection claim. "According to findings made by the Legislature, the Act restricts the most immediately identifiable firearms whose high rate of fire and capacity for firepower substantially outweigh any legitimate sporting or recreational use." (Italics added.) In other words, the Legislature was not required to spend its entire session surveying the weapons industry to come up with a comprehensive list, it was enough to identify a few of the offending guns and let it go at that. Amici (and, at oral argument, the Attorney General) state or imply that any imperfection in the law was a result of ignorance.

But the complaint alleges that the listed guns are no more "immediately identifiable," and that the Legislature was not unaware of the other guns. For example, at a Committee of the Whole hearing of February 13, 1989, the Legislature was informed of the "severe definitional problem" regarding "assault weapons," and the Attorney General appears to concede the Investigation and Enforcement Branch memorandum accurately summarizes the facts, specifically that the Legislature was aware of the existence of the very popular Ruger Mini 14, the M1 and M1 Garand, which are not on the "list," purportedly because they "probably had too large a constituency to ever be worth the risk of including[.]" Nowhere in the hearing was there any effort to segregate the guns ultimately "listed" from other semiautomatic guns, only generic testimony about undefined "assault weapons."

The Attorney General properly concedes that "the legislature was also aware that the list of existing Assault Weapons was not exhaustive. Accordingly it provided a procedure for expanding the list to include those existing firearms which are a prototype or copy of the firearms specified on the Assault Weapon list. (§ 12276.5, subd. (a)(1).) Other firearms that function like the specified assault weapons but are primarily designed and intended for legitimate activities were expressly exempted because the legislature found that they did not pose a similar threat to public safety. [fn.]]]" We agree that the Legislature was aware that the list was not exhaustive and that it accounted for this problem, or attempted to, via the add-on procedures. Further, since the passage of the Act in 1989 it has been amended several times, most significantly in 1991, when the "list" was substantially rewritten. (Stats. 1991, ch. 954, § 2, p. 4440.) This further evidences the Legislature's knowledge.

To the extent the Attorney General and amici argue the "add-on" provision (apart from its own unconstitutionality) would cure underinclusiveness in the Act we disagree. First, the fact would remain that the Act is underinclusive as presently structured. Second, the add-on provision is limited in scope and cannot be used to add all possible weapons with equal or greater rates of fire and capacity for firepower; it can only be used to add guns which are identical except for "slight" modifications and guns which have been "redesigned, renamed, or renumbered" from guns on the list. (§ 12276.5, subd. (a)(1),(2).) But the complaint pleads there are guns which are functionally equivalent to guns on the list, but are not related to those guns in any way.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. The stay previously issued is vacated upon finality of this decision. Plaintiffs shall recover costs on appeal.

PUGLIA, P.J., concurs.

SIMS, Associate Justice, concurring and dissenting.

In their multi-count complaint, plaintiffs (including Colt's Manufacturing Company) aim a constitutional attack at the Roberti-Roos Assault Weapons Control Act of 1989 ("the Act"). (Stats.1989, ch. 19, § 3, p. 64 et seq.) In particular, plaintiffs focus on two statutes enacted by the Act: Penal Code section 12276 and Penal Code section 12276.5.[1] As pertinent, section 12276 sets out a list of assault weapons, identified by brand and model (and sometimes by series) that are subject to restriction by operation of other provisions of the Act. Section 12276.5 sets out procedures whereby additional assault weapons may be added to the list of restricted weapons, ultimately by order of court.

I concur with the majority opinion that the "add-on" provisions of section 12276.5 are facially unconstitutional because they violate the separation of powers doctrine and further violate principles of due process of law.

I also agree with the majority that the invalid provisions of section 12276.5 are severable from the list of weapons set out in section 12276, although I do not share the majority's grudging acceptance of that conclusion. I think it logical that if additional weapons could not be added to those set out in section 12276, the Legislature would naturally want to be able to keep restrictions on what it could, i.e., those weapons listed in section 12276.

I respectfully dissent from the majority's conclusion that plaintiffs have adequately pleaded that section 12276, and particularly the list of assault weapons described therein, violates guarantees of the equal protection of the laws.

Plaintiffs' strongest equal protection claim is founded on the assertion that the Legislature did not include on the section 12276 list certain weapons that are identical to weapons on the list, except for manufacturer.

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

However, "the Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases that might possibly be reached [citation], but is free to recognize degrees of harm and make restrictions affecting those classes of cases wherein the need is deemed to be clearest. [Citation.] The Legislature, in dealing with practical exigencies, may be guided by experience and is at liberty to select one phase of a problem for appropriate action without the necessity of including all others that might be affected in the same field of legislation. [Citations.]" (People v. Banner (1992) 3 Cal. App. 4th 1315, 1322-1323, 5 Cal.Rptr.2d 125.)

"Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous." (Sacramento M.U. Dist. v. P.G. & E. Co. (1942) 20 Cal.2d 684, 693, 128 P.2d 529.)

Here, a rational basis exists for the weapons listed in section 12276. That basis is found in an express legislative finding and declaration set out in section 5 of the Act, as follows: "The Legislature finds and declares that the weapons enumerated in Section 12276 of the Penal Code are particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens...." (Stats.1989, ch. 19, § 5, pp. 69-70.) In short, one reason the Legislature selected the guns listed in section 12276 is that they are particularly dangerous in the hands of criminals. This is plainly a rational distinction that permits the Legislature to outlaw, as a first step, the most notorious weapons while excluding functionally identical weapons made by other manufacturers that have not achieved celebrity status among criminals.

This finding cannot be defeated merely by alleging that the finding is wrong. Rather, "Where there was evidence before the Legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the

Legislature was mistaken." (Minnesota v. Clover Leaf Creamery Co. (1981) 449 U.S. 456, 464, 101 S.Ct. 715, 723, 66 L.Ed.2d 659, 669, fn. omitted.)

Here, in connection with the enactment of the Act, the Legislature held extensive hearings, including a rare meeting of the Assembly as a Committee of the Whole. In light of the evidence taken by the Legislature, plaintiffs cannot show that the classification undertaken by the Legislature is "palpably arbitrary and beyond rational doubt erroneous." (Sacramento M.U. Dist. v. P.G. & E. Co., supra, 20 Cal.2d at p. 693, 128 P.2d 529.)

The trial court properly sustained defendant's demurrer to counts 1, 2, and 3 of the complaint, which allege plaintiffs' equal protection challenge to section 12276.

Plaintiffs have failed to challenge the trial court's ruling sustaining the demurrer as to other counts (6, 7 and 16), and the trial court's ruling is therefore presumed correct.

In count 11, plaintiffs advance an equal protection challenge to the "add on" provisions of section 12276.5. Since we declare these provisions infirm on other grounds, suffice it to say I think this count fails to state a cause of action.

I would affirm the judgment insofar as it sustains defendant's demurrer without leave to amend to counts 1, 2, 3, 6 7, 11 and 16.

I would reverse the judgment insofar as it sustains the demurrer without leave to amend to counts 4, 5, 8, 9, 10, 12, 13, 14 and 15.

Superior Court of the State of California
County of Sacramento

RALPH SANTIAGO ABASCAL, et al.,
Plaintiffs/Petitioners,

v.

DANIEL E. LUNGREN, Attorney General
of the State of California, et al.
Defendants and Respondents.

Case No. 519977.

FINAL ORDER

On December 27, 1993, a formal Order was signed in this matter, sustaining the defendants' demurrer. That Order provided that the demurrer to the first Fifteen Causes of Action was sustained without leave to amend. However, the Order further provided that the defendants' demurrer to the Sixteenth Cause of Action was sustained with leave for the plaintiffs to amend to allege facts which would support their alleged equal protection violation as to the Colt Sporter rifle. The plaintiffs were given ten days from December 27, 1993, in which to file such an amended complaint. Plaintiffs have not amended their complaint nor have they sought an extension of time in which to amend the Sixteenth Cause of Action. Accordingly, this case is dismissed.

Dated: January 24, 1994

/s/
Judge Ronald B. Robie
Judge of the Superior Court

Superior Court of the State of California
County of Sacramento

Ralph Santiago Abascal, Peter Alan Kasler, Prof. Howard McCord, Bruce Danto, M.D., Prof. Gary Mauser, Prof. Joseph P. Magaddino, Betty Jean Snow, Prof. John W. Bowman, Prof. David Henderson, Sean Ford, Edgar A. Suter, M.D., Prof. Edward Erler, James M. Mixson, Prof. Ronald Howard; Prof. Paul Krot, Colt's Manufacturing Co., a Delaware Corporation, Threat Management Institute, a California Corporation,

Plaintiffs/Petitioners

v.

Daniel E. Lungren, in his official capacity as Attorney General of the State of California; the Department of Justice; and the State of California,

Defendants/Respondents.

FIRST AMENDED COMPLAINT FOR INJUNCTION, MANDAMUS PROHIBITION AND/OR CERTIORARI

* * *

11th Cause of Action
(Add-on Declaration Procedure Denies Equal Protection – Strict Scrutiny)

98. Plaintiffs reallege and incorporate herein as if set forth verbatim, paragraphs 1-97.

99. The Act's provisions for giving actual notice of the initiation and pendency of § 12276.5 proceedings are very limited and invidiously discriminate between different persons or entities having equal rights to due process notice because each has an equal and predictable interest in the outcome and an equal right to the opportunity to intervene to oppose a judgment for the Attorney General:

100. Of those potentially and predictably so interested, actual notice and full opportunity to be heard is provided only to "known manufacturer[s] and California distributor[s]" of the firearm against which the suit is brought. (Actual notice is also provided to police and prosecutorial agencies, but they have no potential interest in intervening. The notice to them is only for the purpose of assuring that persons who unknowingly violate the criminal provisions secretly triggered by the declaration of temporary suspension will be apprehended, tried and severely punished.)

101. Actual notice and opportunity to be fully heard is denied to two other sets of readily identifiable parties having obvious interests in a § 12276.5 proceeding to declare that a specific firearm is an assault weapon. Those other identifiable interested parties are: a) those licensed California firearms dealers who are not exclusive distributors of the subject firearm but who may or do buy and sell it, whether new or used; and b) its registered California owners. The interests of these two sets of parties in learning that a § 12276.5 suit has been filed against a specific firearm, and in fully participating in that suit, raise issues of both criminal and civil due process. The criminal due process issue is their interest in learning of an event (the temporary suspension declaration) which has the immediate effect of subjecting them to draconian penalties for transporting, importing, using, lending or selling the subject firearm. The civil due process issue is that unless they are allowed to oppose the § 12276.5 suit, a judgment may be issued bindingly determining that a firearm they own or wish to own or sell is an assault weapon subject to the onerous restrictions of the Act.

CONSTITUTIONAL CLAIM

102. The members of the class "known manufacturer[s] and California distributor[s]" defined by § 12276.5 (d) are no more or less readily identifiable than the members of the classes: a) other licensed California firearms dealers and b) registered California owners of the subject firearm. The civil and criminal due process interests of the class to whom notice is provided are identical to the same

interests of the classes for whom notice is not provided. The denial of notice to either licensed California firearms dealers in general or registered California owners of the subject firearm, violates equal protection in a matter which implicates due process rights. Concomitantly, the Act's special provision of notice to "known manufacturer[s] and California distributor[s]", constitutes a special privilege and a special law contrary to Articles I, § 7 and IV, § 16 of the California Constitution.

102A. The Act also discriminates irrationally by denying the opportunity to be fully heard as of right to others who may identify themselves by seeking to intervene to oppose a § 12276.5 judgment. Others having a legal and due process interest in such intervention include: California residents who may legally own an unregistered firearm which is the subject of a § 12276.5 action or who may wish to buy the subject firearm in the future; nonresidents who currently own the subject firearm or who may wish to buy one in the future and who (like several of the plaintiffs here) may wish to travel in California with their arm or to move here permanently; any manufacturer who did not receive actual notice under § 12276.5 (d); non-California distributors or dealers who sell, or wish to sell, the subject arm to California dealers.

DECLARATORY RELIEF

103. There is an actual and present controversy between the parties to this suit as to the constitutionality of the add-on procedure of the Act. Plaintiffs contend that that procedure and the statute defining it are unconstitutional so that enforcement and implementation thereof is a waste of public funds. Defendants deny and dispute this. Plaintiffs request a declaration that the unique add-on procedure established by § 12276.5 violates equal protection, is a special law and accords special privileges and immunities in that: (a) the Act provides for actual notice to "known manufacturer[s] and California distributor[s]" that a § 12276.5 suit has been filed, but notice is not to be given to other readily identifiable and potentially interested parties (licensed California firearms

dealers in general or registered California owners of the subject firearm) and (b) the law allows a full hearing as of right to "known manufacturer[s] and California distributor[s]" but not to other potentially interested parties who identify themselves and seek to intervene.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

Prof. Howard McCord, Bruce Danto, M.D., Prof. Gary Mauser, Prof. Joseph P. Magaddino, Peter Alan Kasler, Prof. John W. Bowman, Prof. David Henderson, Sean Ford, Edgar A. Suter, M.D., Prof. Edward Erler, James M. Mixson, Prof. Ronald Howard; Prof. Paul Krot, Colt's Manufacturing Co., a Delaware Corporation,

Petitioners

v.

Daniel E. Lungren, in his official capacity as Attorney General of the State of California; the Department of Justice; and the State of California,

Respondents.

APPELLANTS' OPENING BRIEF

ISSUES PRESENTED

This appeal presents the following issues as to whether any viable claim was stated in the Amended Complaint's causes of action against the Roberti-Roos Assault Weapon Control Act:

* * *

3) Whether § 12276.5, requiring that courts issue final judgments which have the effect of adding new firearms to the Act: a) violates civil due process in that it authorizes a judgment binding against interested persons that certain arms shall be restricted under the Act even though those parties are not given notice and are specifically forbidden to participate except as amici; b) also violates equal protection since notice

and an opportunity to oppose the § 12276.5 suit is given to manufacturers and wholesales but not to owners and retail dealers; c) violates the separation of powers requirement because the courts are required to exercise the legislative power to amend, revise and create law; d) violates due process in that criminal defendants are deemed bound by the result of a prior proceeding in which facts about their firearm were bindingly determined though the criminal defendants were not allowed to participate in that prior proceeding; e) violates the guarantees of jury trial, of the right to present evidence and to confront accusers for the same reason; f) violates due process because the determination of whether the arm is to be added to the Act occurs in that prior § 12276.5 proceeding in which the standard of proof is preponderance of the evidence.

* * *

JUDICIAL DECLARATION PROCEDURE FOR ADDING "ASSAULT WEAPONS" VIOLATES EQUAL PROTECTION (11th C/A)

The denial to gun owners, dealers etc. of the personal notice and intervention rights accorded manufacturers and distributors raises **strict scrutiny** equal protection problems which are limned in our 11th Claim. As summarized in Fullerton Junior High School District v. State Bd. of Equalization (1982) 38 C. 3d 779, 798-99:

> The first step in evaluating [an equal protection claim] is to determine the applicable level of scrutiny. "[If the issue] . . . touch[es] on "fundamental interests," . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny [under which] . . . the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distrinctions drawn by the law are necessary to further that purpose.'" [Emphasis by the court; citations omitted.]

As to the validity of the classification whereby distributors and manufacturers receive notice and a hearing but others

who are vitally affected do not, suffice it to say that one's right "to be heard in court to defend one's property is . . . fundamental [and] to justify granting [that] right to one group while denying it to another, the state must show a compelling state interest." Payne v. Superior Court (1976) 17 C. 3d 908, 919.

As demonstrated below, the challenged classification cannot sustain strict scrutiny because it cannot even sustain a minimal level of scrutiny. It is not even rationally related to a proper state interest, much less is it **necessary** to the achievement of a **compelling** interest.

24. Depending on circumstances, the interests of those to whom the Act denies notice and hearing are either greater than those who are accorded it, or indistinguishable therefrom.

The "legitimate state purpose" § 12276.5's notice and hearing provisions are presumably intended to serve is allowing a hearing to all who have a legally cognizable interest while fencing out those who lack such an interest. Unfortunately, the exclusion from of all but manufacturers and distributors from notice and hearing excludes those who may well have even more of an interest than manufacturers and distributors.

Dealers in, and owners of, a particular firearm have real and substantial interests in opposing a § 12276.5 proceeding against it – regardless of whether that firearm is still being manufactured. In contrast, if the firearm is no longer being made, even if they are still in business, "manufacturers and California distributors" have no equivalent interest in opposing its condemnation as an "assault weapon."[52]

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[52] Conceivably the manufacturer might have some attenuated interest in trying to keep the California market open just in case it might sometime wish to resume production. It is dubious that a manufacturer would regard so attenuated an interest as justifying the cost of hiring California counsel to oppose a § 12276.5 action. Former distributors would presumably have no interest whatever.

Under all circumstances, California owners (including dealers) may have an interest in opposing condemnation under § 12276.5 which equals or exceeds that of manufacturers, and particularly of distributors. Admittedly, COLT would be detrimented by a § 12276.5 decree preventing California sale of its "Sporter." But it would continue producing Sporters and selling them in other states around the world. A distributor (wholesaler) would have even less detriment. Any current stock could be disposed of in other states and stocking of the Sport could be discontinued or reduced in consideration of the inability to sell to California dealers.

In contrast, § 12276.5 condemnation of a firearm as an assault weapon will subject California dealers to substantial loss on all their new stock of it and to ruinous loss on those being sold used. (See discussion in footnote 45, supra.) Likewise, for a California hunter condemnation of his firearm deprives him of the only use he has for it and renders it virtually unsalable.

Not even the "rational relationship" test for equal protection is satisfied by § 12776.5's denial to California owners and dealers of the notice and hearing rights it accords to "known manufacturers and California distributors." That denial does not meet the state's legitimate concern to deny notice and hearing rights only to those who have no legally cognizable interest in opposing a § 12276.5 judgment. California owners have at least as great a legal "right free to use and dispose of [their] property" (see footnote 44 supra) as have manufacturer and distributors. Since the latter are accorded notice and hearing rights, § 12276.5's denial of those rights to owners (including dealers) denies them equal protection since it is not rationally related to the legitimate state purpose.

25. Mere administrative convenience is not an adequate state interest to meet strict scrutiny under equal protection standards.

The preceding point argued the Act's lack of any rational basis at all for denying other interested parties the notice and

hearing rights it gives manufacturers and distributors. A fortiori, the classification cannot survive strict scrutiny because making that classification is neither "compelling" nor "necessary" to the furtherance of some other "compelling" purpose or interest.

Obviously, preventing the misuse of firearms is a "compelling state interest." But there is nothing **necessary** to serving that interest about either the bizarre § 12276.5 procedure or its denial of due process notice and hearing rights in particular. Their would have been no need for amendment if the Act had adopted a generic definition of "assault weapon." But let's assume that adding more "assault weapons" to the ban list did serve a compelling interest. Such addition does not require the § 12276.5 procedure; additional firearms could be added to the Act by amending it – which has been done for other purposes in three of the four years since it's enactment. Or, if the bizarre device of judicial declaration is to be used, owners, dealers and others having a cognizable interest could be accorded notice and a right to be heard.

Administrative convenience is the only conceivable explanation for the classification which restricts notice and the right to be heard to manufacturers and wholesalers. After all, per any one arm there are only a few manufacturers and wholesalers to be notified. But DOJ has records of 11,000-plus dealers and thousands, or even tens of thousands, of ordinary owners of handguns it may seek to condemn in a § 12276.5 proceeding. It would be administratively inconvenient to have to send all those thousands of dealers and owners a personal notice of each such proceeding and for courts to have to process the intervention requests which might result.

Yet personal notice to every potentially affected party is precisely what due process requires under the bizarre § 12276.5 device of judicially adding firearms to the Act rather than by the normal process of legislative amendment. Nor is administrative convenience an adequate state interest to meet the strict scrutiny test. Inmates of Sybil Brand Institute v.

County of Los Angeles (1982) 130 C.A. 3d 89, 102-3 and cases there cited; see also Lucchesi v. City of San Jose (1980) 104 Cal.App.3d 323, 331 and Terry, supra, 108 C.A. 2d at 870 (rule which does not otherwise pass rational scrutiny may not be justified by administrative convenience).

26. Denial of due process notice and opportunity to be heard is not a legitimate basis of classification.

We readily concede that, while not compelling, administrative convenience nevertheless is a legitimate state interest. But, at the risk of belaboring the obvious, no interest however legitimate may **legitimately** be pursued by patently unconstitutional means – in this case the **selective** denial of due process. Analogously, no matter how legitimate the interest in suppressing rape, incest, child molestation or adultery, those interests may not be pursued by banning writings or movies because they promote beliefs or ideas which ideas may lead to those evils – for "the First Amendment's basic guarantee is of freedom to advocate ideas." Kingsley Int'l. Pictures v. Regents (1959) 360 U.S. 684, 688-89, 79 S.Ct. 1512, 3. L.Ed. 2d 1512, 1517, American Booksellers v. Hudnet (7th Cir. 1985) 771 F.2d 323, 327-332, aff'd. without opinion, 477 U.S. 1001 (1986).

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S069522

Peter Alan Kasler, et al.
Plaintiffs and Appellants,

v.

Daniel E. Lungren, et al.,
Defendants and Respondents.

Third Appellate District, No. C017769
Sacramento Superior Court Case No. CV519977
The Honorable Ronald B. Robie, Judge

ANSWER BRIEF ON THE MERITS

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* * *

ISSUES PRESENTED

* * *

3) Whether § 12276.5, which requires courts to issue final judgments that have the effect of *adding* firearms to the Act: a) violates civil due process because it authorizes a judgment binding against interested persons even though those persons are not given notice and are specifically forbidden to participate except as *amici*; b) violates equal protection principles since notice and an opportunity to oppose a § 12276.5 suit, although given to manufacturers and wholesalers of the firearm at issue, is *not* given to owners and retail dealers of the firearm . . . .

* * *

B. THE § 12276.5 "ADD-ON PROCESS" DIMINISHES GUN OWNERS AND DEALERS' PROPERTY RIGHTS, AND SUBJECTS THEM TO CRIMINAL PENALTY, WITHOUT ACCORDING THEM DUE PROCESS

1. Due Process Precludes Binding Persons By Judgments Obtained In A Proceeding Of Which They Received No Notice – And In Which They Are Specifically Precluded From Intervening.

Once the "add-on process" is accurately understood as judicial in nature, its violation of due process is evident. The only case either side has found regarding a similar law is Soundgarden v. Eikenberry (Wash. 1994) 871 P.2d 1050. The law there invalidated had created a civil proceeding in which a music video could be declared "erotic." Though notice of this declaration proceeding could be given to only one vendor of the video, the declaration's effect made it a crime for *all* vendors to sell the video to minors.

Compare this with the process § 12276.5 creates. The AG files a petition seeking a judicial declaration that a particular firearm meets the statutory criteria for being an "assault weapon." Manufacturers and wholesalers receive notice, but owners and retail dealers do not – and are limited to participating as *amici* even if they do somehow learn of the case.[54] If the AG proves the § 12276.5 criteria exist, the court declares the firearm to be an assault weapon. This binds *all* owners of the firearm, despite their

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[54] "Sections 12276.5 (d) and (e) limit intervention to "manufacturers and California distributors," all others being relegated to "join[ing] the action as amicus curiae. These limitations ignore the facts that they exclude owners, collectors and dealers who may own dozens of affected firearms (each of them worth as much as $8,000.00 or more); while, if the firearm is a discontinued model, manufacturers may have no interest in litigating the matter. See fn. 3 above and discussion at Section C, # 1 below.

having received *no notice* of the prior proceeding, and their being *barred* from intervening in it.

While Soundgarden also involved free speech, it independently invalidated the similar Washington state procedure because:

> It is true that under the statute no prosecution can take place until after material has been determined by the court to be "erotic." But only one dealer or distributor is notified of the initial hearing. Yet that initial determination by the court applies prospectively and is binding upon all dealers and distributors in the entire state of Washington. The determination thus *becomes state-wide legislation* which affects the rights of non-parties in violation of due process.[55]

A further problem of notice and the chance to intervene being provided to manufacturers and wholesalers, but not to owners and dealers, is that by gravely and discriminatorally curtailing owners and dealers rights to be heard in a civil proceeding adversely affecting their property, § 12276.5 raises equal protection problems that must be reviewed under *strict scrutiny* standards. Appellants' DCA Opening Brief at 82-87.

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[55] 871 P.2d at 1062 (emphasis added). California and federal caselaw to the same effect is cited in appellants' DCA Opening Brief at 62-81.

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PETITION FOR LIMITED REHEARING

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* * *

INTRODUCTION

Appellants respectfully submit that a rehearing is required pursuant to Rule of Court Rule 25 as to a few issues that the Opinion either does not address or that it does not dispose of completely. The Opinion's only mention of the issues raised in the Tenth and Eleventh Causes of Action is at pages 33 and 34. But only due process issues are there addressed by the Court.

Nowhere does the Opinion discuss the equal protection challenge that is the Eleventh Cause of Action. The Eleventh Cause of Action claim is discussed below and also at page 42 of Appellants' answer brief in this Court, incorporating by reference the much more extensive discussion at pages 62-81

of their opening brief in the Court of Appeal. The Eleventh Cause of Action is set out for the convenience of the Court in the appendix attached hereto.

* * *

DISCUSSION

A. THE UNCONSIDERED ELEVENTH CAUSE OF ACTION RAISES STRICT SCRUTINY EQUAL PROTECTION ISSUES THAT REQUIRE REHEARING.

While § 12276.5(e) gives manufacturers/distributors "the right" to intervene in the suit, it discriminatorally denies owners/dealers that right of full participation. Owners/dealers are relegated to mere amicus status. Implicit in this distinction is that manufacturers/distributors enjoy advantages in defending the suit that owners/dealers are denied. In fact, being confined to mere amicus status means that owners/dealers cannot effectively defend against the suit at all.

As amici, they can neither present witnesses of their own, nor cross-examine adverse witnesses. This denies them what due process requires. One who will be bound by a judicial adjudication must have "the opportunity to present evidence in his own behalf" and to cross-examine those whose evidence is given against him;" i.e., the "right to have [the] case tried and determined in accordance with the procedures that are applied in other cases of like character."[3] Also, if judgment is rendered adversely to them in the trial court, the owners/dealers, being condemned to mere amicus status, cannot appeal because § 12276.5(f) limits appeal to parties.

Last, but scarcely least, whether in the trial court or on appeal, amici can only address issues that have been raised, at

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[3] Quoting *Collins* v. *Superior Court* (1956) 145 Cal.App.2d 588, 594 [302 P.2d 805] and cases their cited. See generally *Memphis Light, Gas & Water Division* v. *Craft* (1978) 436 U.S. 1, 16, n. 17 [98 S.Ct. 1554, 56 L.Ed 2d 30] (due process hearing includes the right to support one's claims "by proof.")

least in general terms, by the party they support.[4] This is a grave handicap even in § 12276.5 cases in which manufacturer/distributors intervene. In a § 12276.5 case where there is no intervention, the result is that owners/dealers *cannot be heard at all*, even as amici. In such a situation there would be no party for the amici to support, and so no issue that amici could address.[5] The complaint alleged that current manufacturer/distributors would often choose not to intervene because the guns that § 12276 names are obscure, low-production or long out of production, that former manufacturers/distributors will be unlikely to intervene, and the Attorney General will prevail by default. Amended Complaint ¶92 (set out in the Appendix hereto), and Appellant's Answer Brief in this Court, pages 44-45.

In sum, owners/dealers are discriminatorally denied the full participation that due process and elementary fairness requires -- and which § 12276.5(e) assures manufacturers/distributors as of right. Thus § 12276.5(e) is subject to the rule that classifications that "burden[] a fundamental right" are subject to strict scrutiny.[6] While this Court has extended strict scrutiny to some other kinds of interests, the U.S. Supreme Court holds "fundamental" rights to be co-extensive with those "explicitly or implicitly guaranteed by the Constitution." (*San Antonio School District* v. *Rodriguez* (1973)

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[4] *California Association for Safety Education* v. *Brown* (1994) 30 Cal.App.4th 1264, 1274-75 [36 Cal.Rptr.2d 404] following *E. L. White* v. *City of Huntington Beach* (1978) 21 Cal.3d 497, 510 [146 Cal.Rptr. 614, 579 P.2d 505] and other state and federal cases there cited.

[5] The one relevant exception is that *jurisdictional* issues may be raised by amici even if not raised by the party they support. (*Costa* v. *Workers Compensation Appeals Board, California Casualty Indemnity Exchange* (1998) 65 Cal.App.4th 1177, 1186-1187[77 Cal.Rptr.2d 289].) So owners/dealers could presumably appear to object as amici if a § 12276.5 suit were filed in a county other than those specified in § 12276(a). Perhaps they could also raise constitutional issues. But they could not be heard to provide the kinds of ordinary defenses an intervening party could present.

[6] *Romer* v. *Evans* (1996) 517 U.S. 620, 631 [116 S.Ct. 1620, 134 L.Ed.2d 835]; *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 33-34 and numerous decisions there cited.

411 U.S. 1, 33-34 [93 S.Ct. 1278, 36 L.Ed.2d 16] rehg. denied (1973) 411 U.S. 959 [93 S.Ct. 1919, 36 L.Ed.2d 418]; *Plyler* v. *Doe* (1982) 457 U.S. 202, 216-217 [102 S.Ct. 2382, 102 S.Ct. 2382] rehg. denied (1982) 458 U.S. 1131 [103 S.Ct. 14, 73 L.Ed.2d 1401] rehg. denied *Texas* v. *Certain Named & Unnamed Undocumented Alien Children* (1982) 458 U.S. 1131 [103 S.Ct. 14, 73 L.Ed.2d 1401].) In either view, of course, strict scrutiny is applicable to a statutory scheme that allows some, but not others, to defend a suit whose result will be binding upon them. (*Payne* v. *Superior Court* (South Bay Sentry Dogs) (1976) 17 Cal.3d 908, 919 [132 Cal.Rptr. 405, 553 P.2d 565] (one's right "to be heard in court to defend one's property is . . . fundamental . . . ." [T]o justify granting [that] right to one group while denying it to another, the state must show a compelling state interest.")

At page five of the Opinion this Court recognizes that under strict scrutiny '*the state*' bears the burden of proving a discrimination is '*necessary*' to further [the law's] purpose." (Emphasis by this Court.) Nevertheless Appellants now take up the burden of showing that it is not necessary to deny owners/dealers the rights to intervene and fully participate in § 12276.5 suits.

B. **EVEN UNDER MINIMAL SCRUTINY THERE IS NO JUSTIFICATION FOR DENYING OWNERS/DEALERS EITHER ACTUAL NOTICE OR THE RIGHT TO INTERVENE IN A § 12276.5 SUIT THAT WILL BIND THEM.**

As to notice, DOJ has the name and address of every dealer, and of many owners of the firearms it might bring a § 12276.5 suit against. (See Amended Complaint ¶ 95.) At least as to these easily identified persons it is clearly not "*necessary*" for the statute to deny them the right to actual notice that a suit whose result may bind them has been filed.

Much less, if owners/dealers do somehow learn of the suit, is it not "*necessary*" to deny them any right to intervene and oppose it. The only plausible reason they are denied the same right of full participation given manufacturers/distributors is that diminishing the number of potential interveners

makes it more likely that the Attorney General's suit will not be contested. But the desire to minimize the likelihood of an effective defense against the suit is not a *legitimate or valid* rationale for distinguishing between potential litigants. Such a rationale is subject to the familiar principle that where a law's rationale is *invalid per se*, the law cannot sustain even minimal scrutiny review. (*Del Monte* v. *Wilson* (1992) 1 Cal.4th 1009, 1022 [4 Cal.Rptr.2d 826, 824 P.2d 632]; *Romer, supra*, 517 U.S. at 634-36.)

Appellants respectfully submit that the foregoing discussion suffices to demonstrate at least that rehearing is appropriate so that the Court may address the issues raised in the Eleventh Cause of Action. Insofar as further discussion of the substantive constitutional principles is desired, Appellant respectfully refer the Court to pages 82-87 of our Court of Appeal opening brief.